Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-173

BRIAN KING, Petitioner

versus

MICHAEL NORRIS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS, THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO.

BRIAN KING, Petitioner

v.

MICHAEL NORRIS, Respondent

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1257(3) of Title 28, United States Code and Article 3, Section 2 of the Constitution of the United States directed to the Louisiana Court of Appeal, Third Circuit, to review an order and judgment of that court entered on January 16, 1978, writs refused by the Supreme Court of Louisiana May 5, 1978, and more particularly described in the petition, and for such other and further relief as may be just and proper.

Sign:

FRANK M. BRAME
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426 Kirby Street
Lake Charles, Louisiana
70601

Sign:

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IN THE
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October Term, 1978

NO.

BRIAN KING, Petitioner

v.

MICHAEL NORRIS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS, THIRD CIRCUIT

The petitioner, Brian King, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana Court of Appeal, Third Circuit rendered January 16, 1978.

I.

OPINIONS BELOW

The opinions of the Courts below, consisting of the written reasons for judgment of the Louisiana Ninth Judicial District Court, (unreported opinion), the opinion of the Louisiana Court of Appeal, Third Circuit, and the denial of rehearing, 355 So.2d 21 (January 17, 1978) and the denial of writ of certiorari and review by the Supreme Court of Louisiana, 377 So.2d 1165 (May 5, 1978), all appear in the appendix hereto.

II.

JURISDICTION

The judgment of the Louisiana Court of Appeal, Third Circuit, was entered January 16, 1978 and petitioner's timely application for rehearing was denied March 1, 1978. The timely application for writ of certiorari and review was denied May 5, 1978 by the Supreme Court of Louisiana. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3), Article 3, Section 2 of the Constitution of the United States and the First and Fourteenth Amendments to the Constitution of the United States.

III.

QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution guarantees an individual's right to speak and publish *truthful* information about a public person and public event, which is of public record in official and open court records.

2. Whether a convicted criminal is a private person.

3. Whether under free speech and press guarantees there is *any* limitation on *truthful* publication which is not privileged, is not obtained by intrusion, is not a misappropriation of property and is not reported in a false light.

4. Whether under the First Amendment to the United States Constitution a *private person* enjoys the same and equal protection accorded the *news media* in publication and

speech.

5. Whether the judicially created tort action of "right to privacy", not found in any specific guarantee of the Constitution nor even sanctioned by statute in Louisiana, can be enforced when that tort action infringes upon rights inherent in the United States Constitution.

6. Whether a state court can refuse to apply the rule of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 59 S.Ct. 1029, 43 L.Ed., 2d 328 (1975), *Paul v. Davis*, 424 U.S. 693, 56 S.Ct. 1155, 47 L.Ed. 405 (1976), *Nixon v. Warner Communications*, U.S. , 98 S.Ct. 1306, L.Ed.2d (April 18, 1978), and *Landmark Communications, Inc. v. Commonwealth of Virginia*, U.S. , 98 S.Ct. 1535, 56 L.Ed.2d (May 1, 1978).

7. Whether the California Supreme Court case of *Briscoe v. Reader's Digest Association*, 486 P.2d 34 (1971) has been overruled by the United States Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed., 2d 328 (1975).

8. Whether a *victim* of a crime who publishes in his place of business the method of apprehension of the criminal to deter further crime in his premises is subject to damage suit and injunctive relief *filed two 2 weeks* after release of the *criminal* from sentence.

9. Whether facts *not* within the framework of any of the four (4) branches of the tort of right of privacy set forth in the Second Restatement of Torts Sections 652A-652E, as recognized in *Cox Broadcasting Corp. v. Cohn*, (supra), can

give rise to a new and totally different concept of that tort which encroaches upon free speech.

10. Whether alleged motivation for the publication, although true, was for collection of "debt" from a criminal, for that "debt" which the criminal admitted when he pled guilty to the theft, can remove the First Amendment privilege and protection from publication of truth about the public record figure, the criminal, and activate a right of privacy for that criminal.

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

Fourteenth Amendment to the Constitution of the United States, Section I:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.

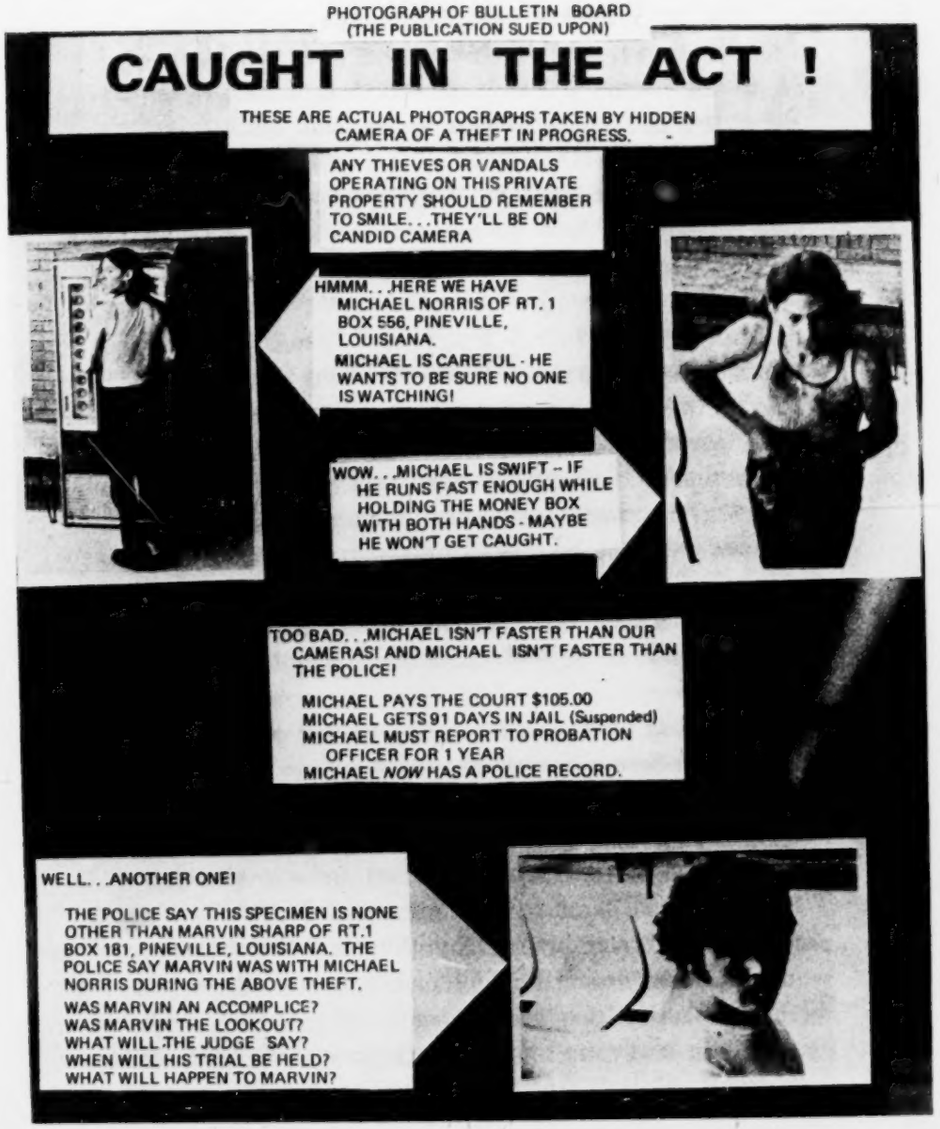
STATEMENT OF THE CASE

Petitioner, Brian King, is the owner of a washateria located in Alexandria, Louisiana. Petitioner, after having been the victim of thirty-six acts of theft, vandalism and other crimes at his place of business, installed a hidden security camera on the premises. Photographs were taken of thieves at their work of stealing and arrests were made, but the rash of thefts continued. In October, 1974, approximately one year after the installation of the security camera, the camera photographed respondent, Michael Norris, with an accomplice, in the act of committing theft at petitioner's place of business.

Charges were filed against respondent, and on November 5, 1974, respondent was arraigned and pleaded guilty to the charge of theft. Respondent was given a one year suspended sentence and placed on probation for one year.

Petitioner continued to be victimized by acts of theft and vandalism at his washateria. Approximately five months subsequent to the sentencing of respondent, and as a result of the continued thefts and acts of vandalism, petitioner placed two bulletin boards in his washateria, one of which depicted respondent, Norris, and his accomplice, Sharpe, committing the theft, and the other depicted another crime, both of which had been solved because of the hidden camera.

PHOTOGRAPH OF BULLETIN BOARD
(THE PUBLICATION SUED UPON)


CAUGHT IN THE ACT !
THESE ARE ACTUAL PHOTOGRAPHS TAKEN BY HIDDEN CAMERA OF A THEFT IN PROGRESS.
ANY THIEVES OR VANDALS OPERATING ON THIS PRIVATE PROPERTY SHOULD REMEMBER TO SMILE. . .THEY'LL BE ON CANDID CAMERA
HMMM. . .HERE WE HAVE MICHAEL NORRIS OF RT. 1 BOX 556, PINEVILLE, LOUISIANA.
MICHAEL IS CAREFUL - HE WANTS TO BE SURE NO ONE IS WATCHING!
WOW. . .MICHAEL IS SWIFT – IF HE RUNS FAST ENOUGH WHILE HOLDING THE MONEY BOX WITH BOTH HANDS - MAYBE HE WON'T GET CAUGHT.
TOO BAD. . .MICHAEL ISN'T FASTER THAN OUR CAMERAS! AND MICHAEL ISN'T FASTER THAN THE POLICE!
MICHAEL PAYS THE COURT $105.00
MICHAEL GETS 91 DAYS IN JAIL (Suspended)
MICHAEL MUST REPORT TO PROBATION OFFICER FOR 1 YEAR
MICHAEL *NOW* HAS A POLICE RECORD.
WELL. . .ANOTHER ONE!
THE POLICE SAY THIS SPECIMEN IS NONE OTHER THAN MARVIN SHARP OF RT.1 BOX 181, PINEVILLE, LOUISIANA. THE POLICE SAY MARVIN WAS WITH MICHAEL NORRIS DURING THE ABOVE THEFT.
WAS MARVIN AN ACCOMPLICE?
WAS MARVIN THE LOOKOUT?
WHAT WILL THE JUDGE SAY?
WHEN WILL HIS TRIAL BE HELD?
WHAT WILL HAPPEN TO MARVIN?

Respondent, Norris, a convicted thief, was under suspended sentence and on probation from November 5, 1974 until November 6, 1975. On November 20, 1975, *only fourteen days after completing his probationary sentence,* respondent sued petitioner for damages and for a permanent injunction prohibiting petitioner from publicizing in any manner the arrest and conviction of respondent. Judgment was rendered by the Louisiana Ninth Judicial District Court on November 4, 1976, only one year after respondent's release from sentence, in favor of respondent, and against petitioner, in the amount of $500.00, with legal interest and all costs, and further, permanently enjoined petitioner "*** from publicizing the arrest and conviction of Michael G. Norris for the theft of monies from a Coke machine located at 3308 Monroe Street, Alexandria, Louisiana, [petitioner's washerteria] in any manner whatsoever."

From that judgment, an appeal was perfected to the Louisiana Court of Appeal, Third Circuit. Judgment of that court was rendered on January 16, 1978, affirming the judgment of the District Court. The dissenting opinion of Chief Judge John T. Hood, Jr., was filed on January [illegible] Rehearing was timely applied for on January 27, [illegible] rehearing was denied on March 1, 1978.

On March 30, 1978, an application for writ of certiorari or review was filed with the Supreme Court of Louisiana. On May 5, 1978, the application was denied by the Supreme Court of Louisiana, the highest Court of the State. Thus, May 5, 1978 is the date for calculating the ninety (90) days for filing the petition for writ to this Honorable Court.

The federal question, the application of the First and

Fourteenth Amendments of the Constitution of the United States, was initially raised by the evidence and in brief before the District Court, urging the application of the Amendments, *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L. Ed.2d 456 (1967) and *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 328 (1975). That Court addressed the federal question in its written reasons for judgment, wherein the Trial Court opinion stated:

> "The Courts of this State have long recognized the right for a plaintiff to recover for an unlawful invasion of his right of privacy. For example, see *Lambert v. Dow Chemical Company,* 215 So.2d 673 (1st Cir. 1968) and the cases cited therein. Here we are faced with the delicate task of *balancing the right of an individual to privacy on one hand against the right of freedom of expression on the other.* We are unable to find any case in this State or any other state wherein this issue was met squarely.
>
> In *Briscoe v. Reader's Digest Association,* 483 P.2d 34 (1971) the California Supreme Court was faced with a conflict between the right of freedom of the press and the right of privacy. Without quoting extensively from that opinion it suffices to say that the Court concluded that one of the major objectives of society and of the administration of our penal system is the rehabilitation of the fallen. Where a person has rehabilitated himself, he should be permitted to continue in the path of rectitude rather than be thrown back into a life of shame or crime. The Court pointed out that even the thief

on the cross was permitted to repent during the hours of his final agony. The Court went on to state that:

> 'One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his antisocial acts. In return for becoming a 'new man', he is allowed to melt into the shadows of obscruity.'

The California Court then went on to hold that it is for the trier of fact to determine (1) whether the plaintiff has become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed. This Court accepts the above test and applying it here finds that the plaintiff has married and become a rehabilitated member of society, *that the defendant's [petitioner's] conduct is highly offensive and injurious to the reasonable man, that the defendant [petitioner] published the information with total disregard for its offensiveness and that there is not sufficient independent justification for defendant's [petitioner's] act.*

A factor to be considered in making the above de-

termination and in assessing damages is the recentness of the criminal offense. There seems little doubt that at the time of the offense and for a period of time thereafter the defendant was entitled to truthfully discuss this criminal act and even to publish it on the bulletin board in his business. However, this Court feels that *as of the filing of this suit [2 weeks after release from sentence] the plaintiff has rehabilitated himself and that the continued publication of his offense served no public interest . . .*" (Appendix A p. 3) (Emphasis supplied here and elsewhere by petitioner)

The federal question - the Constitutional question - was again raised in appellate brief to the extent that the entire brief addressed this question and set forth the issues in the identical language adopted in the Court of Appeal opinion. The majority of the panel of the Louisiana Court of Appeal stated the sole issues under consideration to be:

"ISSUES

A. Did the actions of Brian King constitute an invasion of the privacy of Michael G. Norris?

B. *Does the holding of the Trial Court violate the rights of Brian King which are guaranteed by the First Amendment to the United States Constitution?*" (355 So. 2d 21, 23, Appendix C p.11)

The majority of the panel in considering the constitutional issue stated:

"Defendant cites several United States Supreme Court decisions for his contention that the conduct did not constitute an invasion of privacy and that the ruling of the trial court violated defendant's constitutionally guaranteed freedoms of speech and press. However, without going into an extensive discussion of the various cases cited by defendant-appellant, we find these cases not applicable to the case at bar. These *cases cited by defendant-appellant* [1] *all involve publication by either the news media, or by some other organization acting in the public interest. This case involves a publication by one individual, involving information concerning another individual.* The cases cited by defendant-appellant involve privilege and/or responsibility of the news media to openly publish, and this case involves a private citizen's right and privilege to do so. *The responsibilities of the news media are very different from those of the individual citizen.* The whole purpose and aim of the

1. (a) *Cox Broadcasting Corporation v. Cohn,* 520 U.S. 469, 43 L.Ed. 2d 328 95 S.Ct. 1029 (1975).
(b) *Time, Inc. v. Hill,* 358 U.S. 374, 87 S.Ct. 534 17 L.Ed.2d 456 (1967).
(c) *Billy Sol Estes v. State of Texas,* 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct.
(d) *Police Department of City of Chicago vs. Mosley,* 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972).
(e) *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).
(f) *Organization for a Better Austin vs. Keefe,* 402 U.S. 415,91 S. Ct. 1575, 29 L.Ed. 2d, (1971).
(g) *Craig v. Harney,* 331 U.S. 367, 374, 91 L. Ed. 1546, 1551, 67 S.Ct. 1249. (1947)
(h) *Nixon v. Warner B. Communications, Inc.*——U.S.— , 98 S.Ct. 1306,— L.Ed.2d —, (April 18, 1978)

news media is to bring forth information to the public, to apprise the public of the events transpiring from day to day. *That responsibility, duty, and purpose are not shared by the ordinary individual.* At least no cases to the contrary have been brought to our attention by defendant-appellant." (355 So.2d 21,24, Appendix C , p. 15)

VI.

REASONS FOR GRANTING THE WRIT

A.

IT IS IMPRACTICABLE, IF NOT IMPOSSIBLE, TO EXPLAIN THIS COURT'S RESULT TO LAWYERS OR LAYMEN OF THIS COUNTRY OR OF THE WORLD AND THIS COURT SHOULD PUBLISH FOR ALL TO READ AND KNOW THAT FREE SPEECH-ESPECIALLY FREE SPEECH OF THE TRUTH-DOES EXIST IN THE UNITED STATES OF AMERICA.

How can one explain a judicial decision under a Constitution which must accord to all free speech and free publication but which punishes, by casting in damages and by mandatory and prohibitory injunction, the victim of a crime for truthfully publishing within the confines of his property, for the protection of his property and his customers, that a criminal was apprehended by a concealed security camera? Surely, it is impossible to explain the rewarding of the criminal who has never made restitution of that which he thieved when he claims an invasion of his privacy in a suit instituted two (2) weeks after sentence was served and when he lives a thousand miles from the place of publication. He is neither rehabilitated to privacy nor is his privacy invaded

so as to humilitate him. This cannot constitute justice; this cannot be equated at all with judicial protection of Constitutional rights, and this cannot be an example of American humanism and humaneness which our government would hold out to other nations as the design for that world humaneness we now demand of all the world as a national policy.

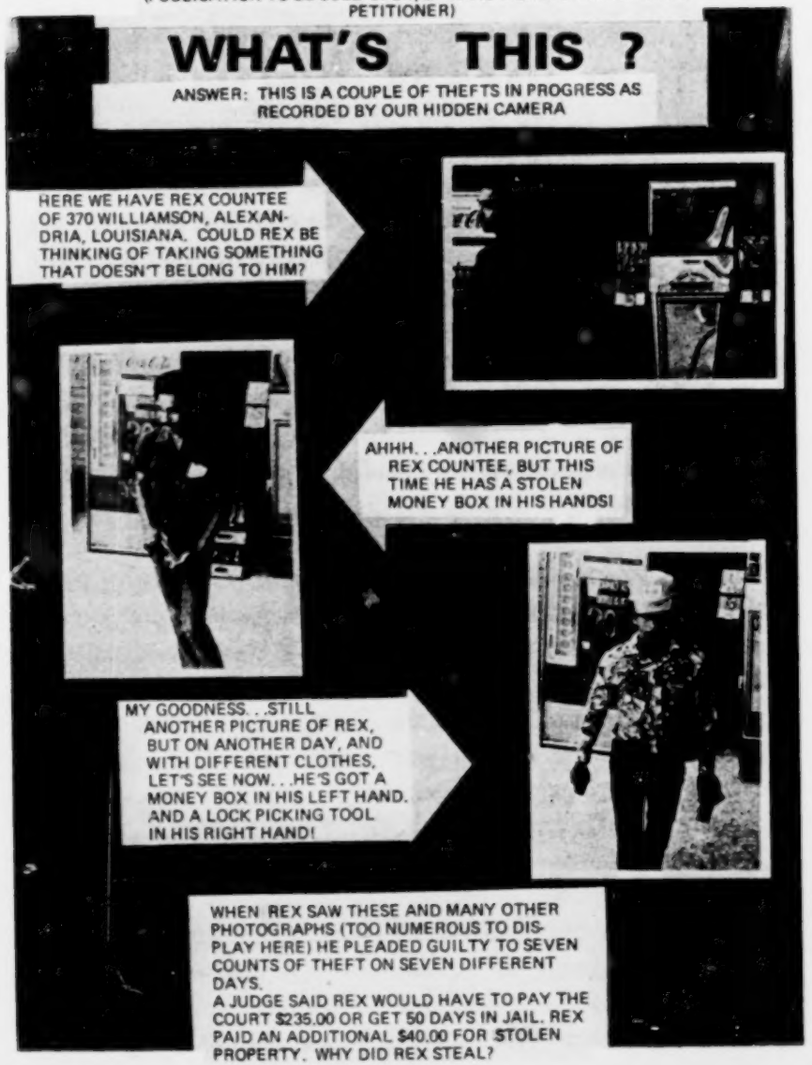
Most respectfully and without imputing ill motives or making any disrespectful aspersions on the courts below, petitioner feels compelled to make a comparison with a recent event of great world impact. Soviet or U.S.S.R. justice in the recent trials of dissidents can hardly be more inhumane than that treatment accorded your petitioner by the result of this case. What would Soviet citizens and lawyers think of this case as an example of United States' legal justice? What would Soviet newspapers publish about the democratic judicial system?

Freedom -especially free speech - where is it to be found in this result? Who can speak if the publication of the truth concerning a *most* public figure - a most recent criminal who victimized the publisher of the truth - if that speaker is allowed to be punished as the Courts below have punished petitioner?

Petitioner would suggest that under the statement of law in this writ application the writ can be granted summarily by citation of the Constitution and this Court's jurisprudence and the case should be remanded for judgment in accord therewith.

Petitioner has now been threatened with another lawsuit by the criminal depicted on the second bulletin board in his washateria. By the time this petition for writ relief is filed or considered, that suit will be pending. That publication is depicted by the following photograph.

ANOTHER SUIT PENDING
PHOTOGRAPH OF BULLETIN BOARD
(PUBLICATION TO BE SUED UPON, DEMAND ALREADY MADE UPON PETITIONER)


WHAT'S THIS ?
ANSWER: THIS IS A COUPLE OF THEFTS IN PROGRESS AS RECORDED BY OUR HIDDEN CAMERA
HERE WE HAVE REX COUNTEE OF 370 WILLIAMSON, ALEXANDRIA, LOUISIANA. COULD REX BE THINKING OF TAKING SOMETHING THAT DOESN'T BELONG TO HIM?
AHHH. . .ANOTHER PICTURE OF REX COUNTEE, BUT THIS TIME HE HAS A STOLEN MONEY BOX IN HIS HANDS!
MY GOODNESS. . .STILL ANOTHER PICTURE OF REX, BUT ON ANOTHER DAY, AND WITH DIFFERENT CLOTHES, LET'S SEE NOW. . .HE'S GOT A MONEY BOX IN HIS LEFT HAND. AND A LOCK PICKING TOOL IN HIS RIGHT HAND!
WHEN REX SAW THESE AND MANY OTHER PHOTOGRAPHS (TOO NUMEROUS TO DISPLAY HERE) HE PLEADED GUILTY TO SEVEN COUNTS OF THEFT ON SEVEN DIFFERENT DAYS.
A JUDGE SAID REX WOULD HAVE TO PAY THE COURT $235.00 OR GET 50 DAYS IN JAIL. REX PAID AN ADDITIONAL $40.00 FOR STOLEN PROPERTY. WHY DID REX STEAL?

B.

THE DECISIONS BELOW CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AS TO THE AMBIT OF PROTECTION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHEN CONFRONTED WITH A CLAIM FOR AN ALLEGED "INVASION OF PRIVACY" BECAUSE OF A TRUTHFUL PUBLICATION ABOUT A PUBLIC RECORD PERSON.

The question of whether rights guaranteed through the Fourteenth Amendment of the United States Constitution by the First Amendment to the United States Constitution can be abridged when it is asserted that an individual's right to privacy has been invaded has been considered by this Court on several occasions. The opinion of the Louisiana Court of Appeal, in the instant case, is in direct conflict with the pronouncements of this Court on right to privacy versus First Amendment freedoms.

In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456 (1967), this Honorable Court held that even when the communications alleged to invade an individual's privacy were false, constitutional protections for speech and press precluded attempts to redress false reports of matters of public interest in the absence of proof that the communication or publication was made with knowledge of its falsity, or in reckless disregard of the truth. Contrary to *Time v. Hill*, supra., the Louisiana Court of Appeal held that the protections of speech and press found in the Constitution of the United States are subservient to an individual's tort claim of privacy invasion even when the communications complained

of *are concededly true and are of public record.*

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed. 2d 328 (1975), this Court held that the communication or publication of truthful information which was found to be a matter of public record, appearing in official court records, was paramount to an individual's claim that the publication or communication invaded his privacy. Contrary to this holding, the Louisiana Courts have held that the communication made by petitioner, even though found in official court records, and further, even though the truth of the communication was not questioned, was not subject to protection of the First Amendment.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d 1(1971), this Court held that a claim that the interest of an individual in being free from public criticism did not warrant use of the Court's injunction power. Further, the Court noted that designating the conduct complained of as an invasion of privacy was no not sufficient to support an injunction against peaceful distribution of information. Again, and contrary to the opinion of this Honorable Court, the Louisiana Court of Appeal condoned prior restraint on expression, and affirmed the lower court's use of extraordinary injunctive relief to severely curtail petitioner's right to participate in discussion of an issue which is of crucial importance to him and to the limited public to whom it is published, i.e., his customers.

The Louisiana Court held directly contrary to this Honorable Court's holding in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155,47 L.Ed.2d 405 (1976) that an individual's alleged privacy right to be free from publication of information which

was either wholly false, or the truth of which could not be proved, was not a privacy right protected by the constitution of the United States. In that case it was stated that "***the Court has recognized that 'zones of privacy' may be created by more specific Constitutional guarantees.***" The Court then said "None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge this further." Under that case, *Paul v. Davis*, and its succinct holding alone, this Court is certainly justified in granting petitioner's application. The Court could, unless it wants to expand upon this issue more fully, grant relief by reversal, remand and directions to the Louisiana Court of Appeal, Third Circuit.

Paul v. Davis held that no right of privacy vested in one merely accused by arrest. Here privacy is upheld for one convicted, who pleaded guilty, who was sentenced. The holding of the Louisiana Court of Appeal is in direct conflict with the Court's holding in *Paul v. Davis*, supra., in that the Louisiana Court gave constitutional proportions to the alleged right of privacy in holding that the alleged privacy right of a recently convicted person was paramount to the freedoms of speech found in the First Amendment.

In a per curiam opinion, *Oklahoma Publishing Company v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) this Honorable Court reviewed a District Court order. That Court had enjoined members of the news media from "publishing, broadcasting or disseminating, in any manner the name or picture of minor child" in connection with a particular proceeding in that District Court. This Honorable Court, citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) and *Cox*

Broadcasting Corp. v. Cohn, said:

> "In Cox Broadcasting the Court held that a State could not impose sanctions on the accurate publication of the name of a rape victim 'which was publicly revealed in connection with the prosecution of the crime.' Id, at 471, 95 S.Ct. 1029, 43 L.Ed.2d 328. There, a reporter learned the identity of the victim from an examination of indictments made available by a clerk for his inspection in the courtroom during a recess of court proceedings against the alleged rapist. The Court expressly refrained from intimating a view on any constitutional questions arising from a state policy of denying the public or the press access to official records of juvenile proceedings, id. at 496 n 26, 95 S.Ct. 1029, 43 L.Ed.2d 328, but *made clear that the press may not be prohibited from 'truthfully publishing information released to the public in official court records.'* " Id. at 496, 95 S.Ct. 1029, 43 L.Ed.2d 328.
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> * * *
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> "The name and picture of the juvenile in that case were 'publicly revealed in connection with the prosecution of the crime,' 420 U.S., at 471, 95 S.Ct. 1029, 43 L.Ed.2d 328 [Nebraska v. Stuart] much as the name of the rape victim in Cox Broadcasting was placed in the public domain. Under these circumstances the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments." 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355.

Very recently in the Spring Term in *Richard Nixon v. Warner Communications Inc.* 46 LW4320, No. 76-944 Sup. Ct. Docket (April 18, 1978) this Court reaffirmed the clear and concise holding of *Cox Broadcasting Corp. v. Cohn*, supra. Importantly, the Court restated the holding in *Cox Broadcasting*; "Our decision in that case merely affirmed the right of the press to publish *accurately* information contained in court records *open to the public.*" (emphasis here and elsewhere supplied by writer) The Court further stated; "The First Amendment generally *grants the press no right to information about a trial superior to that of the general public.*" And quoting from *Estes v. Texas*, 381 U.S. 532, 589 (1965) states "****a reporter's constitutional rights are no greater than those of any other member of public.*" See also *Landmark Communications, Inc. v. Virginia*, 46L.W. 4389 Docket No. 76-1450 (May, 1978).

These holdings should automatically, without need for docketing for argument, grant petitioner relief and grant a reversal and remand.

The Louisiana Third Circuit Court of Appeal recognized that the issue of whether the holding of the trial court violated petitioner's First Amendment rights was res nova in Louisiana. The Supreme Court of Louisiana having refused to review the case, the opinion of the Court of Appeal becomes a pronouncement of the highest court in Louisiana. The Court's opinion is in conflict with not only one, but with four or more decisions rendered by this Honorable Court recently. The Court's opinion represents the law of the State of Louisiana to be in direct conflict with numerous pronouncements of this Honorable Court.

C.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING CONSTITUTIONAL PROBLEMS CONFRONTED BY BOTH FEDERAL AND STATE COURTS AND DECIDED CONFLICTINGLY IN NUMEROUS JURISDICTIONS. PETITIONER RESPECTFULLY SUGGESTS THAT IT IS INCUMBENT UPON THIS HONORABLE COURT TO CONFRONT AND RESOLVE THE ISSUES PRESENTED BY THIS PETITION *AND MAKE UNIFORM THE LAW AND* JUSTICE.

This Honorable Court has heretofore avoided defining the limits of the so-called tort of of privacy. Further, the Court has left unresolved the critical question of to what degree, *if any*, the rights guaranteed by the First Amendment to the United States Constitution can be abridged by legislative or judicial attempts to protect the sensibilities of an individual who asserts that a communication or publication has infringed on his so-called right to privacy as a result of the disclosure of facts which he claims to be embarrassing.

The Court's failure to resolve the questions presented by this petition, and in particular, to define the ambit of protection afforded by the Constitutional freedoms of speech and press when confronted by an individual's assertion that his privacy has been invaded, has resulted in the development of conflicting and irreconcilable standards of interpretation and of application of these Constitutional guarantees. Further, the judiciary has been allowed to assume unto itself the prerogative of censorship. The state Courts' erosion of long recognized and long cherished individual liberties found within the First Amendment and the strong conflicts between

states are made blatantly apparent by examination of the developing jurisprudence where the so-called right of privacy has come in conflict with First Amendment freedoms.[2]

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2. ALABAMA--Five cases with conflicts. First Amendment prevails over right to privacy, *Smith v. Doss*, 37 So.2d 118 (1948) and *Abernathy v. Thornton*, 83 So.2d 235 (1955). Cf. *Daily Times Democrat v. Graham*, 162 So.2d 474 (1962). See also *Bell v. Birmingham Broadcasting Co.*, 96 So.2d 263 (1957) and *Norris v. Moskin Stores, Inc*, 132 So.2d 321 (1961).

ARIZONA--Three cases. Right of privacy recognized. *Reed v. Real Detective Pub. Co.*, 162 P.2d 133 (S.C. Ariz. 1945), *Pegler v. Sullivan*, 432 P.2d 593, 6 Ariz.App. 338 (1967) and *Cluff v. Farmers Insurance Exchange*, 460 P.2d 666 (Ariz.Ct.App. 1969) Arizona does not recognize Prosser's 1st category but recognizes intentional harm.

CALIFORNIA--Twelve cases. The jurisprudence relied upon by the Louisiana court in this case, the case of *Briscoe v. Reader's Digest Association*, 483 P.2d 34, 93 CL. RPTR. 866 (1971), is the case which has been rejected by almost all state courts and the case is differentiated or avoided by most California opinions since that time. It was also cited as the basis for the State of Georgia opinion in *Cox Broadcasting Corporation v. Cohn*, which was reversed by the United States Supreme Court. Numerous cases in *California People v. Kunkin*; 100 Cal. Rptr. 845, 24 Cal. App. 3d 447 (1972). *O'Hilderbrandt v. Columbia Broadcasting System, Inc.*, 114 Cal. Rptr. 826, 40 Cal. App. 3d 323 Ct. of App. (1974), *Johnson v. Harcourt, Brace, Jovanovich, Inc.* 118 Cal. Rptr. 370, 43 Cal.App. 3d 880 (1974), and *Beruan v. French*,128 Cal. Rptr 869, 56 Cal App. 3d 825 (1976) distinguish *Briscoe. Melvin v. Reed*, 112 Cal. App. 285 (1976) 297 P.2d 91 (1931) and *Briscoe* are almost always differentiated from cases like the case at hand or are rejected outright.

COLORADO--*Lincoln v. Denver Post*, 501 P.2d 152 (Colo.Ct.App. 1972), held that a criminal defendant lost all right to privacy and *iN re Hearings Concerning Canon 35 of Judicial Ethics*, 296 P.2d 465 (1956) held when one emerges from seclusion there can be no invasion of privacy.

CONNECTICUT--Five cases. The leading case of *LaFontaine v. Family Drug Stores, Inc.*, 360 A.2d 899, 33 Conn.Sup. 66, (1976) cites the other four cases and discusses them and states, "Once the actual *arrest* occurred, the facts related to it were no longer private and they became part of the public records. *A person charged with the violation of the law loses her right of privacy regarding that matter.*" Emphasis supplied.

No better example of judicial assumption of the right of censorship, and of unusual interpretation and application of Constitutional principles can be found than the unexplainable results obtained by the courts below in the instant litigation. While this case represents a most glaring example of the disintegration of constitutional speech and press freedoms, as shown in the case citations in the footnote, it is by no means the only example.

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2 - Continued

DELAWARE--Four cases. Right of privacy very restricted. *Barbieri v. New-Journal Co.,* 189 A.2d 773 (S.Ct.Del. 1963) held that criminal did not reacquire right to privacy after 9 years of leading a reformed life, citing *Sidis v. F--R. Pub. Corp.,* 113 F. 2d 806 (2d Circuit 1940) and rejecting *Briscoe* and *Melvin vs. Reed.*

FLORIDA--Seven cases. Basically Florida holds right of privacy subservient to the First Amendment. *Stafford v. Hayes,* 327 So.2d 871 (1976) *Fletcher v. Florida Publishing Co.,* 319 So.2d 100. Cf. *Patterson v. Tribune Company,* 746 So.2d 623 (1962) where statute closed docket entries to public and the right of privacy prevailed over the First Amendment.

GEORGIA--Five cases. While right of privacy is recognized *Fischer v. J.C. Penney Co., Inc.,* 219 S.E. 2d 626 (1976) held shoplifting charges was matter of public interest and makes one a public figure not entitled to right of privacy.

HAWAII--*Fergerstrom v. Hawaiian Ocean View Estates,* 441 P.2d 141 (S.Ct. Hawaii 1968). Right of privacy appropriate for commercial protection.

IDAHO--*Taylor v. K.T.V.B. Inc.,* 525 P.2d 984 (S.Ct. Idaho 1974), arrest makes one a public figure without right to privacy citing *New York Times v. Sullivan* and *Gertz.*

INDIANA--*Patton v. Jacobs,* 78 N.E.2d 789, 118 Ind. App. 358 (App. Ct. of Ind. 1948), recognizes no legitimate interest or purpose to be served and publicized in an oppressive and coercive manner to be minimum requirement for action.

ILLINOIS--Eight cases. Follow *Times vs. Hill* and the First Amendment prevails when a novel or film depict a convicted criminal. See *Leopold v. Levine,* 259 N.E.2d 250 (1970).

In the Federal system there is less conflict and difficulty and there has been a substantial attempt in some of the Circuits to regulate the States' application of the First Amendment in privacy cases. However this has not been entirely successful.

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2 - Continued

IOWA--Three cases appear to give no recognition to right of privacy *Bremmer v. Journal - Tribune Pub. Co.,* 76 N.W.2d 762 (1956), *Yoder v. Smith,* 112 N.W.2d 862 (1962) and *Winegard v. Larsen,* 260 N.W.2d 816 (1927) cert. den. 2/17/1978.

KANSAS--Leading case *Rawlins v. Hutchinson Publishing Co.,* 218 Kan. 295, 543 P.2d 988 (S. Ct. 1975). This case analyzes the California cases. Rejects *Briscoe* and *Melvin v. Reid* of California citing *Cox Broadcasting Corporation v. Cohn* of the United States Supreme Court as negating the force of the California Decisions of *Briscoe* and *Melvin.*

LOUISIANA--Until the present case, Louisiana had limited the right of privacy recovery to *Prosser's* and the *Reinstatement's* four categories. (1) Intrusion: *Lucas v. Ludwig,* 313 So.2d 12 (La. App. 4 Cir. 1975). (2) Public disclosure of private facts: *Lambert v. Dow Chemical Co.,* 215 So.2d 673 (La.App. 1 Cir. 1968); *Hamilton v. Lumbermen's Mutual Cas. Co.,* 82 So.2d 61 (La. App 1 Cir. 1955). (3) False light in public eye: *Tooley v. Canal Motors, Inc.,* 296 So.2d 453, (La. App. 4 Cir. 1974). (4) Appropriation of another's name: *Tooley v. Canal Motors, Inc.,* supra; *McAndrews v. Roy,* 131 So.2d 256 (La.App. 1 Cir. 1961). The case under consideration does not restrain or confine itself to its own statement of the law. Yet it is the last pronounced and since certiorari was denied it is the law as stated in the jurisprudence of the highest court in Louisiana.

MAINE--First recognized right of privacy in *Berthiaume's Estate v. Pratt,* 365 A.2d 792 (Supreme Judicial Ct. of Me. 1976).

MASSACHUSETTS--Six cases. All rejected invasion of privacy tort action.

MARYLAND--Five cases. Cases recognized tort of invasion of privacy. They do not protect a public fact or figure.

MICHIGAN--*Beaumont v. Brown,* 237 N.W.2d 501 (Ct.App. 1975), recognizes only the four branches of invasion of privacy given by Prosser.

In fact, petitioner respectfully suggests that the Ninth Circuit Court of Appeal is in direct conflict with the other Circuits and directly contrary to the Supreme Court of the United States. For an example see *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). There a magazine article made public disclosure of private facts about the plaintiff. The Federal District Court reviewing this situation in a federal jurisdiction in California cited *Kapellas v. Kofman*, 1 C.3d 20, 35 n. 16, 459 P.2d 912, 81 Cal. Rptr. 360 (1969), and stated that California had adopted *Prosser's* analysis (which is also the *Restatement's* rationale) of the four separate torts of invasion of privacy *i.e.*, (1) intrusion; (2) *public* disclosure of embarrassing *private* facts; (3) false light and (4) appropriation. The District Court had decided that case before the *Briscoe v. Reader's Digest* case was rendered in California.

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2 - Continued

MISSISSIPPI--Martin v. Dorton, 50 So.2d 391 (1951), public persons cannot be protected under right of privacy.

MISSOURI--Five cases. Conflict among the cases as to priority to First Amendment and the right to privacy. In the latest case *Williams v. KCMO Broadcasting Div. - Meredith Corp.*, 472 S.W.2d 1 (Supreme Ct. Mo. 1971), arrestee has no right to action in invasion of privacy.

MINNESOTA--Has never recognized a cause of action for invasion of privacy. It would do no more than what was required under the four branches of Prosser, Torts, (4th ed. pp 802-814). *Henry v. Conner*, 226 N.W.2d 921 (S.Ct.Minn.1975).

NEW JERSEY--Two cases *Devlin v. Greiner*, 371 A.2d 380, (1977) 147 N.J.Super. 446 (1977) and *Canessa v. J.I. Kislah,Inc*, 235 A.2d 62 (Superior Ct.N.J. 1967).

NEW MEXICO--Three cases. All publication of public records is protected by the 1st Amendment.

NORTH CAROLINA--Two cases recognize right of privacy, *Flake v. Greensboro News Co.*, 195 S.E.55 (1938) and *Barr v. Southern Bell Telephone and Telegraph Co.*, 185 S.E. 2d 714 (1972).

When the Ninth Circuit Court of Appeal reviewed the District Court judgment it cited both *Kapellas* from the Trial Court's opinion and then noted that *Briscoe v. Reader's Digest*, supra, had been decided in 1971 since the Federal District Court had decided the case under consideration. The Ninth Circuit Court stated that the *Restatement*, which had been cited in *Cox v. Cohn*, was the latest statement on the tort of invasion of privacy. However at page 1126, footnote 4, the Court states that the *Restatement* requirements fairly comport with the requirements of *Briscoe v. Reader's Digest*. How is that possible when *Cox v. Cohn*, which is cited by the Ninth Circuit in the body of opinion as the law of the case and as being the same tort as is involved in that case, had rejected Briscoe impliedly and had overruled, sub silentio the *Briscoe* holding. The *Restatement* and *Prosser* are very similar. *Briscoe* is contrary to *Cox v. Cohn* and *Briscoe* is contrary to the *Restatement* and *Prosser* unless the *Briscoe* holding is that invasion of privacy occurs when truth is published in a "false light". (Prosser's 4th category).

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2 - Continued

NEW YORK--Limited right of privacy by statute Article 5 of C.R.L. Section 50 and Section 51. Four cases. First Amendment prevails for newsworthy and public record accounts.

OHIO--Recognizes right to privacy. *Dayton Newspaper, Inc. v. City of Dayton*, 259 N.E.2d 522, 23 Ohio Misc. 49 (Ct. of Common Pleas of Ohio 1970), held First Amendment did not grant the press a legal right to access to executive session or private meetings of City Commissioners.

OREGON--*Ayers v. Lee Enterprises, Inc.*, 561 P.2d 998 (Supreme Ct. 1977). Specifically follows Cox and approves Cox's adopting of the *Restatement of Torts* in regard to public record people having no right to privacy.

Interestingly in *Virgil v. Time, Inc.*, supra, the Court stated that it is not an invasion of privacy to communicate a fact concerning the plaintiff's private life to a "single person or *even to a small group of persons.*" Your petitioner's publication was most certainly made to a small group of persons, a particular group of persons who constituted a public intensely interested in the publication, and who needed the knowledge imparted by that publication, i.e., customers and potential criminals.

Cox v. Cohn stated that information about crime and criminals is of legitimate concern to the public and one is privileged to publish this information. Other cases out of the Supreme Court of the United States have said even arrestees and

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2 - Continued

PENNSYLVANIA--Eight cases. *Vogel v. W. T. Grant Co.*, 327 A.2d 133, 458 Pa. 124 (S.Ct.Pa.1974) discusses the development of the action for invasion of privacy in Pennsylvania and accepts Prosser's four part analysis. *Corabi v. Curtis Pub. Co.*, 273 A.2d 899,441 Pa. 432 (S.Ct.Pa. 1971) held a public figure has no exclusive right to his own life story or to a claim for invasion of privacy if one publishes a true biography.

RHODE ISLAND--*Henry v. Cherry and Webb*, 30 R.I. 13 (1909) rejects the tort of invasion of privacy.

SOUTH CAROLINA--Three cases. In *Herring v. Retail Credit Co.*, 224 S.E. 2d 663 (1976), credit report including plaintiff's imprisonment for crime of gambling was public event and public had a legitimate interest in knowing the facts. First Amendment prevails.

SOUTH DAKOTA--*Truxes v. Kenco Enterprises, Inc.*, 119 N.W.2d 914 (1963). First Amendment, right of press to report public things, i.e., photograph of post office employee at work does not infringe right of privacy.

TEXAS--Three cases. No strong lines drawn.

WISCONSIN--*Slawek v. Strott*, 215 N.W.2d 9 (1974). Wisconsin does not recognize cause of action for invasion of privacy.

suspects of crime are of legitimate concern to the public and the news about them can be publicized. The Ninth Circuit Court stated, "We conclude that unless it be privileged as newsworthy (A subject we discuss next), the publicizing of private facts is not protected by the First Amendment". The Court then relies upon the *Restatement* which *Cox v. Cohn* had relied upon to determine what is newsworthy.

Petitioner strongly contends that the language of the Ninth Circuit Court in *Virgil v. Time, Inc.*, does not conform to what was then the most recent Supreme Court case, *Cox v. Cohn*, nor to the *Restatement*. The reasoning is, in fact, contrary to the holding and discussion in *Cox v. Cohn*. At page 1131, footnote 14, the Ninth Circuit Court again cited *Briscoe v. Reader's Digest* and states emphatically that the story of a crime may be retold but that the name of the criminal *must be concealed*. How can one write history? How can one tell the story of the major criminals and crimes of the time? How can people know what our civilization was like if the truth about bad people and events as well as the truth about good people and events cannot be spread before the public? Newsworthy? Why just "newsworthy"? Why not worth publishing, not as "news", but as truth of interest to the public; as truth which must be published and recorded so that the public of now and tomorrow can try to improve our society?

The Eighth Circuit appears contrary to and in conflict with the Ninth Circuit. In the Eighth Circuit, in *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, (8th Cir. 1976), the plaintiff claimed a right of privacy although he was serving a sentence. The right of privacy that he claimed was for the publication of portions of a confidential psychiatric report which were

not read in open Court but which were published in a news article by the defendant. The first claim of privacy was the *constitutional right of privacy* and the Court, citing *Cox v. Cohn*, quickly held McNally, the plaintiff, did not put forth a constitutional privacy privilege because of the privilege of publishing public information. The Court held that because all of the report could have been read and some of the report was read into the record, the information not in the record was still of a public nature and that ". . .defendant's publication thereof does not support a claim for invasion of any constitutional right of privacy." In the following discussion of the *tort* of invasion of privacy, the Court analyzed the Missouri cases, which we have cited in our Footnote 2, supra, and held that Missouri law, not in conflict with any Supreme Court pronouncements nor Constitutional provisions, does not grant relief for claim of invasion of privacy when, "The facts published were matters of public record." The Court also held that previous discussion of the constitutional claim, *i.e.*, under *Cox v. Cohn*, was dispositive of the tort claim. At page 78, footnote 13, the very obvious is noted by the Court, "The public has a strong interest in enforcement of the criminal laws. . . Disclosures relative to these matters are clearly within the public interest. Since the contested publication does not amount to an invasion of constitutional privacy or a tortious public disclosure of private facts, we need not consider the constitutional issues suggested in *Time, Inc. v. Hill*, (citation omitted). Cf. *Cox Broadcasting Corp. v. Cohn*, (citation omitted). See generally, W. Prosser, *Handbook of the Law of Torts*, section 118 at 823-27 (4th Ed. 1971)."

The Fourth Circuit, also contrary to the Ninth Circuit, supports petitioner's view in a very brief opinion in *Anderson v. Stanco Sports Library Inc.*, 542 F.2d 638 (4th Cir. 1976). There the plaintiff had sued the defendant for libel alleging false and malicious statements. Applying state law of South Carolina that "substantial truth" is a valid defense to a libel claim, the Court affirmed the lower court's granting of a motion for summary judgment because there was no dispute of fact that the publication was true or of "substantial truth" and a valid defense. It is the footnotes in that case which are most interesting for evidencing and confirming that there is a conflict between the circuits.

> "The Court's opinion in *Cox Broadcasting Corp. v. Cohn* (citation omitted) although an invasion of privacy rather than libel suit may be seen as supporting the conclusion that Anderson is a public figure. There the Court stated that '(t)he commission of crime, prosecution resulting from it and judicial proceedings arising from the prosecutions . . .are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.' " (p. 640, n.5.)

The Court relies heavily upon *Time, Inc. v. Firestone*, 424 U.S. 448,96 S.Ct. 958, 47 L.Ed.2d 154 (1976) and *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). In footnote it's stated that *Firestone* "emphasized the importance of the voluntariness of the libel plaintiff's fame." (p. 640, n.5.) The Fourth Circuit Court concludes in the footnote that one who thrusts himself into the public eye (such as a criminal) is always, always public and that one who is drawn into the public arena by others or involuntarily and who then recedes from the public eye as soon as possible, is not a public figure. The Court quotes: "More

commonly, those classed as public figures *have thrust themselves to the forefront* of particular public controversies in order to influence the resolution of issues involved. *Gertz* at 453, 96 S.Ct. at 965" (p. 640, n 4.)

No one could more *deliberately thrust himself* into the public arena than one who breaks the law and knows the consequences are a public trial and a forever living public record of conviction. Even more than most public figures who are in governmental office, the criminals are deliberate public figures.

See *Bergman v. Stein*, 404 F.Supp. 287 (1975) at page 296 and 297, to observe that the Second Circuit Court of Appeals appears to follow the Fourth and Fifth Circuits and is in conflict with and contrary to the Ninth Circuit.

Certainly the respondent in the case, sub judice, *Norris*, would be a public figure and the information published about him would be of public interest and concern and especially of public interest and concern to the small, limited group to whom the publication was given, that is, the customers of petitioner who would gain knowledge that they would have protection while they were on the premises and visitors who would be warned not to commit crime. Anonymity would not be effective for petitioner's purpose. Blank faces, covered faces, and no names would spoil the effectiveness and usefulness of the boards. Many who would observe the bulletin board would then simply conclude that this was just another advertisement about concealed security cameras. But, when the individual, when the name, when the face and when the conviction is glaring before one who might turn criminal, then the warning is believed. In fact, the proof of the matter is in the record. Criminals did not take warning

before the bulletin boards, but after their installation, crime entirely ceased on the premises. It was the truthful publication on the bulletin boards and not the camera, that stopped crime in the washateria.

Respectfully petitioner urges this honorable court to reconcile the conflicts between the Ninth Circuit Court of Appeal and other Circuits as well as the conflict with the Supreme Court of the United States.

This Court has, on prior occasions, been presented the opportunity of defining the limits of constitutional freedoms of speech and press, and at the same time establishing the parameters within which an individual's right to privacy can be legislatively or judicially protected. The issues were first confronted by the Court in *Time v. Hill*, supra., wherein the court restricted its holding to the determination of the standards to be applied when resolving the questions of whether the press had invaded an individual's privacy by the publication of false information. In *Hill*, the court appeared to limit its holding due to a clarification by a New York court to the effect that truth was an absolute defense to actions under New York's privacy statute.

In *Cox Broadcasting Corp. v. Cohn*, supra., when presented with a so-called invasion of privacy versus freedom of the press, the court restricted its holding to the determination of '***whether the state may impose sanctions on accurate publication of the name of a rape victim obtained from public records -- more specifically, from judicial records which are maintained in connection with the public prosecution and themselves are open to public inspection". As in *Hill*, supra., *Cox* established guidelines to be followed by courts confronted with privacy claims versus press freedoms which could be

utilized in only the most limited situations.

The Court has also, on other occasions, either directly or peripherally, dealt with the conflict between alleged privacy rights and constitutional freedoms. The most recent case is *Nixon v. Warner Communications*, supra. However, the Court has failed to expand prior guidelines for resolving the issues presented in privacy litigation, even though the present guidelines have application to only the most limited factual situations, and have proved inadequate.

The proliferation of privacy actions and the conflicting application of constitutional principles in these privacy actions (see footnote 2) mandates the establishment of contours within which privacy can be protected without infringing upon the most basic Constitutional freedoms. Even if this Court does not decide to set sweeping guidelines to be applied in all privacy litigation, it is respectfully suggested that it is now incumbent upon the court to confront the issue of whether truthful communications can result in the imposition of civil liability when it is alleged that those communications cause embarrassment or humiliation to an individual. A majority of this court recognized the danger in leaving the issue unresolved in *Cox Broadcasting Corp. v. Cohn*, supra., at p 1043. While recognizing the dangers of constitutional infringement by the imposition of civil liability for publication of truthful -- though personal or private -- information, the Court resolved the issue within the limited framework of the facts presented in that case.

D.

AN IMPRESSIVE AND EVEN ENTICING REASON FOR GRANTING THE PETITION IS THAT THERE WILL NEVER BE A BETTER VEHICLE AVAILABLE TO THIS HONORABLE COURT WITH WHICH TO RESOLVE THE ISSUE OF WHETHER TRUTHFUL COMMUNICATIONS CAN BE PRECLUDED BY THE ASSERTION OF PRIVACY RIGHTS THAN FOUND IN THE INSTANT CASE.

The novel but tight factual situation considered in this litigation offers the court an ideal opportunity to erect a framework within which the developing law of privacy can mature compatible with constitutional principles. Unlike previous cases presented to this court, this case contains numerous components of privacy law never before presented in a single case.

Unlike *Time v. Hill*, supra., but similar to *Cox Broadcasting Corp. v. Cohn*, supra, the communicatory content complained of by respondent is truthful -- accurate. Unlike *Time v. Hill*, supra., and *Cox Broadcasting Corp. v. Cohn*, supra., but like *Nixon v. Warner*, supra., the privacy right asserted is a non-statutory -- judicial creation. Unlike *Hill*, supra., and *Cox*, supra., but similar to *Austin v. Keefe*, supra., the assertion is that respondent privacy has been invaded by an individual -- one not a member of the organized media. Unlike *Time v. Hill*, supra., but like *Cox*, supra., the facts contained in the communication were derived from matters available to the public at large -- judicial records. Also contrary to the holding in *Austin v. Keefe*, supra., the most dangerous tool available to the judiciary -- injunctive power -- has been utilized as an instrument to enforce restraint on expression.

A prime example of the inconsistent development of privacy law is that the State of New York recognizes that truth is an absolute defense to privacy actions under the New York statute. See *Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324, 274 N.Y.S. 2d 877, 221 N.E. 2d 543 (1966) as noted in *Time, Inc. v. Hill*, supra. A contrario, in the instant litigation, Louisiana courts have apparently concluded, although the court evaded discussion of the issue, that truth of the assertions is no defense to a privacy action. The failure of Louisiana courts to shield truthful communications from extirpation from the guarantee of the Constitution -- particularly when this Honorable Court has firmly maintained that truth is an absolute defense to defamation actions -- must be corrected for fear that this case will become the cornerstone for a mass of jurisprudence to that same effect.

It should be noted here that, unlike the majority of privacy cases coming before this court, the alleged privacy right asserted was not the creation of a legislative body. Rather, the so-called privacy right, which is labeled in most jurisdictions as "public disclosure", was a creation of the judiciary. This so-called zone of privacy established by the Louisiana courts has never been subjected to intense legislative debate for the determination of the existence of a compelling state interest in protecting asserted privacy rights. And as gleaned from the Louisiana Court's opinion, the question of whether a compelling state interest in the protection of individual privacy rights existed so as to justify giving constitutional import to privacy, was never considered. The alleged zone of privacy asserted here has never been deemed worthy of constitutional protection and in fact has always been excluded by this Honorable Court, very expressly in *Paul v. Davis*, supra. Yet contrary to that case, the law of the State of

Louisiana is that privacy rights, such as alleged in this case, which are void of any compelling state interests and of any Constitutional basis, are deemed paramount to First Amendment protections of speech and press.

In *Paul v. Davis*, this Court refused to create a niche within the Constitution to protect an individual from being subjected to communications ***which stated facts, if not wholly false, at least could not be proven true.*** Certainly, the need for uniformity in constitutional interpretation will not allow this Court to condone the creation of a zone of privacy within the confines of the constitution for the protection of an individual from publication of ***facts claimed to be embarrassing which are wholly true.*** That case, ***Paul v. Davis*** also made simple arrest a public record and not subject to privacy claims.

In May of the Spring Term, this Court rendered *Landmark Communications, Inc. v. Commonwealth of Virginia*, supra where consideration of exposure or divulging of *truthful information* about judges in "confidential proceedings" of a judiciary commission was at issue. The question there about embarrassing truth was whether confidentiality of such proceedings and "injury to official reputation" is sufficient "for repressing speech that would otherwise be free. *New York Times v. Sullivan*, 376 U.S. at 272-273. See also *Garrison v. Louisiana*, 379 U.S. 64,67." The Court had previously cited *Cox Broadcasting Corp. v. Cohn* and held that truth and free speech could not be subservient even conceding that there was present a legitimate state interest that confidentiality would better serve the ends of the proceedings. The Court again quoted from *Cox*. ***"At the very least,*** the First and Fourteenth Amendments ***will not allow exposing the press to***

liability for truthfully publishing information released to the public in official Court records." (For later consideration of the press's right versus the private individual's right of free speech, note that Mr. Chief Justice Burger wrote this opinion. Cf. *First National Bank of Boston v. Bellotti*, 46 L.W. 4371, No. 76-1172, Sup.Ct. Docket (April 26, 1978). Mr. Chief Justice Burger concurring at pp. 4380-4381.)

It is noteworthy that the same strong language repeating the holding in *Cox Broadcasting Corp. v. Cohn* and totally affirming that holding is found in the most recent cases of *Nixon v. Warner* (April 18, 1978) and *Landmark Communications, Inc. v. Commonwealth of Virginia* (May 1, 1978). Remember, also, the compelling holding in *Paul v. Davis* (1976). *Cox Broadcasting* and these cases demand a reversal of the Louisiana decision. This is an important petition for writs because the highest Louisiana Court absolutely refuses to follow this Honorable Court. For the reaction of other states see footnote 2, supra. This is an important petition for writs because it so perfectly presents most compelling and critical current Constitutional issues in an excellent fact situation.

E.

A FURTHER COMPELLING NEED FOR THIS HONORABLE COURT TO GRANT THIS PETITION IS THE NECESSITY FOR CLARIFICATION OF THE QUALITY OF RIGHTS GUARANTEED *TO AN INDIVIDUAL*, IN COMPARISON WITH THOSE GUARANTEED *TO THE PRESS*, BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As noted by Mr. Chief Justice Burger in his recent concurring opinion in *First National Bank of Boston v. Francis X. Bellotti*, supra, this Court has never directly confronted the question of whether the institutional press enjoys any greater rights under the First Amendment than are enjoyed by the individual citizens.

In many court opinions, it is implied that freedoms of speech and press are synonymous. In *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, rehearing denied 323 U.S. 819, 65 S.Ct. 557, 89 L.Ed. 630 (1945), the Court noted that it was not by accident or coincidence that these rights were coupled in a single guarantee with the other First Amendment rights, since all rights within the amendment are inseparable. This case presents an excellent instrument for clarification of whether press and speech freedoms can be equated. Even if this Honorable Court does not desire to firmly pronounce the equation of press and speech freedoms, the Court can, and must of necessity, establish the equality of speech and press freedoms when the communications complained of are wholly true.

The Louisiana Court of Appeal, Third Circuit has held that even though communicatory content is truthful, when the communication is made by an individual -- one not an organ of the organized press -- the communications are not subject to constitutional protection:

> "This case involves the publication *by one individual*, involving information concerning another individual. The cases cited by defendant-appellant involved the privilege and/or responsibility *of the news media* to openly publish, and this involves a *private citizen's* right and privilege to do so. *The*

> *responsibilities of the news media are very different from those of an individual citizen.* The whole purpose and aim of the news media is to bring forth information to the public, to appraise the public of the events transpiring from day to day. *That responsibility, duty and purpose are not shared by the ordinary individual."*

The First Amendment rights of free speech and free press produce correlative rights in the listener or reader to hear or read. The opinion of the majority of the panel of the Louisiana Court of Appeal, Third Circuit condones open and blatant censorship by the judiciary in that the Court would have allowed readers access to petitioner's communications had they appeared in a media publication or communication, but deemed the limited and vitally concerned public had no need for access to the communications *since they were made by a private citizen.*

The communications censored by the Louisiana courts were truthful -- accurate reports of events deemed socially significant by petitioner. The communications were not of the quality deemed unworthy of constitutional protection such as fighting words, or in some instances defamatory speech. Had the communications appeared in a press publication, numerous pronouncements by this Court leave no uncertainty that such communications would have been recognized as being protected by the First Amendment.

It is respectfully suggested that this Honorable Court cannot allow the opinion of the Louisiana Court of Appeal, Third Circuit -- *the law of Louisiana* -- to stand for the proposition that an individual citizen's communication is deemed

less worthy of protection under the First Amendment than would a similar communication if made by the press. It is incumbent upon this Court, at least insofar as it pertains to truthful communications, to establish the equality of speech freedom for the individual with that enjoyed by the press.

The danger of allowing the decision of the Louisiana Court of Appeal, Third Circuit -- *the law of the State of Louisiana* -- to stand uncorrected is evidenced by that Court's reliance upon the decision of the California Supreme Court in *Briscoe v. Reader's Digest Association*, 483 P.2d 34 (1971). *Briscoe* has been oft cited as authority for providing protection to an alleged privacy right although such protection resulted in the narrowing of speech and press freedoms. In *Cox Broadcasting Corp. v. Cohn*, supra, this Honorable Court impliedly reversed the Briscoe decision. However, many courts have refused to recognize this only implied reversal with the effect of continued reliance upon the holding in that case.

Just as in *Briscoe*, this Court's failure to explicitly reverse the Louisiana Court of Appeal, Third Circuit will allow that court's decision to be cited by some as reflecting this Honorable Court's acquiescence in the expansion of privacy rights at the sacrifice of inherent personal liberties derived from the First Amendment. The Court's acquiescence can only result in a pyramiding of decisions which distend privacy rights with a resulting constriction of speech and press freedoms.

VII.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue by this Honorable Court to review the judgment of the Louisiana Court of Appeal, Third Circuit. For those reasons stated, the writ can issue without docketing for argument and reverse and remand the case with instructions. However, the issues presented are of such moment and so exactly drawn that justice and law may be better served if the writ is granted for brief and argument.

Most respectfully submitted,

Sign:

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Sign:

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1800 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Counsel for Petitioner

CERTIFICATE

This is to certify that three (3) copies of the above and foregoing petition for a writ of certiorari have been mailed this day, postage prepaid, to Bernard Kramer, Attorney at Law, 807 Johnston Street, Alexandria, Louisiana 71301, attorney for Michael G. Norris, thus serving all parties required.

New Orleans, Louisiana, this day of July, 1978.

MACK E. BARHAM

APPENDICES

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APPENDIX A
Louisiana Ninth Judicial District Court,
Reasons for Judgment

CIVIL SUIT NUMBER 96,320

MICHAEL G. NORRIS — NINTH JUDICIAL DISTRICT COURT

VS. — PARISH OF RAPIDES

BRIAN KING — STATE OF LOUISIANA

(November 4, 1976)

REASONS FOR JUDGMENT

The facts of this case are reasonably undisputed and will not be recited herein. Simply stated, the basic issue presented here is whether the actions of the defendant, Brian King, constituted an unlawful invasion of the right of privacy of the plaintiff, Michael G. Norris. If this issue is resolved in plaintiff's favor, he asks for both injunctive relief and monetary damages.

The Courts of this State have long recognized the right for a plaintiff to recover for an unlawful invasion of his right of privacy. For example, see *Lambert v. Dow Chemical Company*, 215 So.2d 673 (1st Cir.1968) and the cases cited therein. Here we are faced with the delicate task of balancing the right of freedom of expression on the other. We were unable to find any case in this State or any other state wherein this

issue was met squarely. In *Briscoe v. Reader's Digest Association*, 483 P. 2d 34 (1971) the California Supreme Court was faced with a conflict between the right of freedom of the press and the right to privacy. Without quoting extensively from that opinion it suffices to say that the Court concluded that one of the major objectives of society and of the administration of our penal system is the rehabilitation of the fallen. Where a person has rehabilitated himself, he should be permitted to continue in the path of rectitude rather than be thrown back into a life of shame or crime. The Court pointed out that even the thief on the cross was permitted to repent during the hours of his final agony. The Court went on to state that:

> "One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a 'new man', he is allowed to melt into the shadows of obscruity."

The California Court then went on to hold that it is for the trier of fact to determine (1) whether the plaintiff has become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed. This Court accepts the above test and applying it here finds that the plaintiff has married and become a rehabilitated member of society, that the defendant's conduct is highly offensive and injurious to the reasonable man, that the defendant published the

information with total disregard for its offensiveness and that there is not sufficient independent justification for defendant's act.

A factor to be considered in making the above determination and in assessing damages is the recentness of the criminal offense. There seems little doubt that at the time of the offense and for a period of time thereafter the defendant was entitled to truthfully discuss this criminal act and even to publish it on the bulletin board in his business. However, this Court feels that as of the filing of this suit the plaintiff had rehabilitated himself and that the continued publication of his offense served no public interest. It is extremely difficult if not impossible to point out an exact time after which the defendant's conduct was legally impermissible. It is also difficult to allocate the embarrassment and humiliation which the plaintiff suffered between the period when the publication was permissible and the period thereafter. All things considered, the Court feels that an award of $500.00 would adequately compensate the plaintiff both for this improper use of his name and picture on the bulletin board and for any over zealous attempts to collect for damages resulting from the criminal act.

For the above reasons, judgment is rendered in favor of the plaintiff, Michael G. Norris, and against the defendant, Brian King, in the sum of $500.00 together with legal interest thereon from date of judicial demand and further permanently enjoining the defendant, Brian King, from publicizing in any manner the arrest and conviction of the plaintiff, Michael G. Norris. All costs are assessed against the defendant, Brian King.

Counsel may prepare judgment for signature by this Court in accordance with the inabove opinion.

THUS DONE AND SIGNED on this the 4th day of November, 1976, at Alexandria, Louisiana.

s/ Martin L. Laird, III
MARTIN L. LAIRD, III
District Judge
Division "D"

APPENDIX B

Louisiana Ninth Judicial District Court, Judgment

Number 96,320

Division "D"

MICHAEL G. NORRIS

VERSUS

BRIAN KING

NINTH JUDICIAL DISTRICT COURT

PARISH OF RAPIDES

STATE OF LOUISIANA

FILED In Open Court - November 19, 1976
Frances N. Melder Dy. Clk.

JUDGMENT

This case having come on for trial pursuant to regular assignment and after considering the pleadings, the evidence and the arguments of counsel, and for the reasons assigned in a written Reasons For Judgment dated November 4, 1976, it is by reason thereof

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of plaintiff, Michael G. Norris, and against the defendant, Brian King, enjoining Brian King from publicizing the arrest and conviction of Michael G. Norris for the theft of monies from a coke machine located at 3308 Monroe Street, Alexandria, Louisiana, in any manner whatsoever. It is further

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of the plaintiff, Michael G. Norris, and against the defendant, Brian King, in the full sum of Five Hundred (500.00) Dollars, together with legal interest thereon from date of judicial demand until paid, plus all costs of these proceedings.

JUDGMENT RENDERED in Alexandria, Rapides Parish, Louisiana on November 4, 1976.

JUDGMENT SIGNED in Alexandria, Rapides Parish, Louisiana, on the 19th day of November, 1976.

s/ Martin L. Laird, III
MARTIN L. LAIRD, III
DISTRICT JUDGE
DIVISION "D"

APPENDIX C

Louisiana Court of Appeal, Third Circuit, Opinion

NUMBER 6007

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

(January 16, 1978)

MICHAEL G. NORRIS,
Plaintiff-Appellee

VERSUS

BRIAN KING,
Defendant-Appellant

APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT FOR THE PARISH OF RAPIDES, STATE OF LOUISIANA, BEFORE THE HONORABLE MARTIN L. LAIRD, III, PRESIDING JUDGE.

Before: HOOD, FORET & HEARD, Judges.

FORET, J.

This suit was instituted by Michael G. Norris against Brian King alleging that King's action in erecting a bulletin board in his place of business, upon which were placed photographs of the plaintiff taken while he was in the act of committing a

Hood, J. dissents and will assign written reasons

theft upon the defendant's premises and which also contained captions referring to the subsequent guilty plea entered by Norris for the commission of the theft, caused him embarrassment, humiliation and constituted harrassment. Judgment was rendered in favor of Michael Norris, and defendant, Brian King, appealed. Plaintiff, Michael Norris, has answered the appeal asking that the award of damages be increased.

Plaintiff, Michael Norris, was arrested for the theft of money taken from a Coke machine located in a washateria in the City of Alexandria which is owned by defendant, Brian King. On November 5, 1974, Michael Norris pled guilty to the charge of theft in the Alexandria City Court. For the commission of the theft, Norris was given a $100.00 fine, a suspended jail sentence, and was placed on probation for a period of one year.

During the above mentioned theft, photographs were taken of Norris and an alleged accomplice by means of a hidden security camera located in the washateria. Subsequent to the guilty plea entered by Norris, defendant, Brian King, erected in his washateria bulletin board upon which he posted two photographs of Michael Norris and one photograph of his alleged accomplice taken during the commission of the theft. Posted at the top of the bulletin board was the following printed heading:

"CAUGHT IN THE ACT!

THESE ARE ACTUAL PHOTOGRAPHS TAKEN BY HIDDEN CAMERAS OF A THEFT IN PROGRESS."

Immediately below this heading was a typewritten caption which read:

"ANY THIEVES OR VANDALS OPERATING ON THIS PRIVATE PROPERTY SHOULD REMEMBER TO SMILE. . . THEY'LL BE ON CANDID CAMERA!"

Immediately below this caption were two typewritten captions printed on cut out arrows, each of which pointed to one of the photographs taken of Norris and which read:

"HMMMM . . . HERE WE HAVE MICHAEL NORRIS OF RT. 1 BOX 556, PINEVILLE, LOUISIANA.

MICHAEL IS CAREFUL -- HE WANTS TO BE SURE NO ONE IS WATCHING!"

"WOW. . . MICHAEL IS SWIFT -- IF HE RUNS FAST ENOUGH WHILE HOLDING THE MONEY BOX WITH BOTH HANDS -- MAYBE HE WON'T GET CAUGHT."

Immediately following the above two captions was another caption which stated:

"TOO BAD. . .MICHAEL ISN'T FASTER THAN OUR CAMERAS! AND MICHAEL ISN'T FASTER THAN THE POLICE!

MICHAEL PAYS THE COURT $105.00
MICHAEL GETS 91 DAYS IN JAIL (suspended)
MICHAEL MUST REPORT TO A PROBATION OFFICER FOR 1 YEAR
MICHAEL *NOW* HAS A POLICE RECORD"

Below the caption immediately quoted above was located a photograph of the alleged accomplice in the theft and located to the left of this photograph was the following typewritten caption which was placed on an arrow pointing to the alleged accomplice's photograph:

"WELL. . . ANOTHER ONE!

THE POLICE SAY THIS SPECIMEN IS NONE OTHER THAN MARVIN SHARP OF RT. 1, BOX 181, PINEVILLE, LOUISIANA, THE POLICE SAY MARVIN WAS WITH MICHAEL NORRIS DURING THE ABOVE THEFT.

WAS MARVIN AN ACCOMPLICE?
WAS MARVIN A LOOKOUT?
WHAT WILL THE JUDGE SAY?
WHEN WILL HIS TRIAL BE HELD?
WHAT WILL HAPPEN TO MARVIN?

Norris brought suit against Brian King alleging that the publication of the photographs and captions referring to the theft and subsequent guilty plea caused him considerable humiliation and embarrassment and constituted undue harassment. The trial court rendered judgment in favor of Norris in the amount of $500.00 and permanently enjoined the defendant, Brian King, from further publicizing in any manner the arrest and conviction of Michael Norris.

The trial judge stated that the issue facing the Court was whether the actions of Brian King constituted an unlawful

invasion of the "Right of Privacy" of the plaintiff, Michael Norris. He further stated that the award was to compensate the plaintiff both for the improper use of his name and picture on the bulletin board and for any over-zealous attempts to collect for the damages resulting from the theft.

ISSUES

A. Did the actions of Brian King constitute an invasion of the privacy of Michael G. Norris?

B. Does the holding of the trial court violate the rights of Brian King which are guaranteed by the First Amendment to the United States Constitution?

Defendant denies that he displayed the pictures to pressure the plaintiff into making restitution. We find difficulty in reconciling that contention of the defendant with the fact that he delayed six or seven months before posting the pictures in his place of business. The defendant stated that his purpose in displaying the pictures was to discourage or deter others from burglarizing his place of business. When questioned on cross-examination as to why he could not have omitted the name and address of the plaintiff, and/or have blacked out the identifiable facial features of the plaintiff, defendant replied that the desired effect of the publication would have been lost, because they would not appear as authentic, and therefore be of less benefit to the defendant.

The cause of action known as "invasion of privacy" has long been recognized and pronounced by the jurisprudence of this State[1]. Tooley v. Canal Motors, Inc., 296 So2d 453

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(1) Denis v. Laclerc, 1 Mart. (O.S.) 297 (1811).

(La. App. 4 Cir. 1974) described the right of privacy as follows:

> ". . . 'the right to be let alone' and as 'the right to live one's life in seclusion without being subjected to unwarranted and undesirable publicity'."
>
> . . .
>
> "As appears from the cited cases and as discussed at length in the Comment at 28 La. Law Rev(April 1968) malicious intent on the part of the defendant is not a necessary element in the prosecution of an invasion of privacy claim. If the defendant's conduct is unreasonable and seriously interferes with plaintiff's privacy the invasion is actionable."

This tort has usually been associated with conduct falling into one or more of the following classifications:

(1) Intrusion (Lucas v. Ludwig, 313 So2d 12 (La. App. 4 Cir. 1975), certiorari denied, 318 So2d 42);
(2) Public disclosure of private facts (Lambert v. Dow Chemical Co., 215 So2d 673 (La. App. 1 Cir. 1968); Hamilton v. Lumbermen's Mutual Cas. Co., 82 So2d 61 (La. App. 1 Cir. 1955);
(3) False light in public eye (Tooley v. Canal Motors, Inc., supra);
(4) Appropriation of another's name (Tooley v. Canal Motors, Inc., supra; McAndrews v. Roy, 131 So2d 256 (La. App. 1 Cir. 1961).
See also Prosser, 48 Calif. Law Review, 383.

We are unable to find, and nor was any case in this State

or any other state cited to us, wherein the issue involved herein was met squarely. In Briscoe v. Reader's Digest Association, 483 P 2d, 34 (1971), the California Supreme Court was faced with a conflict between the right of freedom of the press and the right to privacy. The trial court in the case at bar had this to say in reference to *Briscoe*:

> "Without quoting extensively from that opinion, it suffices to say that the court concluded that one of the major objectives of society and of the administration of our penal system is the rehabilitation of the fallen. Where a person has rehabilitated himself, he should be permitted to continue in the path of rectitude rather than be thrown back into a life of shame or crime. The court pointed out that even the thief on the cross was permitted to repent during the hours of his final agony. The quote went on to say that:
>
> 'One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a 'new man' he is allowed to melt into the shadows of obscruity.'
>
> "The California court then went on to hold that it is for the trier of fact to determine (1) whether the plaintiff has become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant pub-

lished its information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed. This Court accepts the above test and applying it here finds that the plaintiff has married and become a rehabilitated member of society, that the defnedant's conduct is highly offensive and injurious to the reasonable man, that the defendant published the information with total disregard for its offensiveness and that there is not sufficient independent justification for defendant's act.

"A factor to be considered in making the above determination and in assessing damages is the recentness of the criminal offense. There seems little doubt that the defendant was entitled to truthfully discuss this criminal act and even to publish it on the bulletin board in his business. However, this Court feels that as of the filing of this suit the plaintiff had rehabilitated himself and that the continued publication of his offense served no public interest. It is extremely difficult if not impossible to point out an exact time after which the defendant's conduct was legally impermissible. It is also difficult to allocate the embarrassment and humiliation which the plaintiff suffered between the period when the publication was permissible and the period thereafter. All things considered, the Court feels that an award of $500.00 would adequately compensate the plaintiff both for this improper use of his name and the picture on the bulletin board and for any overzealous attempts to collect for damages resulting from the criminal act."

In addition to awarding the monetary damages hereinabove mentioned, the trial court also permanently enjoined the defendant, Brian King, from publicizing in any manner the arrest and conviction of the plaintiff, Michael G. Norris.

Defendant cites several United States Supreme Court decisions for his contention that the conduct did not constitute an invasion of privacy and that the ruling of the trial court violated defendant's Constitutionally-guaranteed freedoms of speech and press. However, without going into an extensive discussion of the various cases cited by defendant-appellant, we find these cases not applicable to the case at bar. These cases cited by defendant-appellant all involve publication by either the news media, or by some other organization acting in the public interest. This case involves a publication by one individual, involving information concerning another individual. The cases cited by defendant-appellant involve the privilege and/or responsibility of the news media to openly publish, and this case involves a private citizen's right and privilege to do so. The responsibilities of the news media are very different from those of the individual citizen. The whole purpose and aim of the news media is to bring forth information to the public, to apprise the public of the events transpiring from day to day. That responsibility, duty, and purpose are not shared by the ordinary individual. At least no cases to the contrary have been brought to our attention by defendant-appellant.

The facts of this case illustrate the repeated harrassment by defendant King of plaintiff and his family. That harassment was unreasonable, and seriously interfered with plaintiff's privacy. Accordingly, the invasion is actionable. Tooley v. Canal Motors, Inc., supra. Instead of pursuing

restitution in a civil proceeding, defendant King instead chose to telephone plaintiff and his mother and make threats to plaintiff, the mother, and the integrity of the entire family. When these threats did not produce the results which he sought, defendant finally chose to display the photographs of plaintiff in a manner most ridiculing to plaintiff, and to announce to the world that plaintiff had been convicted of a crime, in a manner motivated by reasons which would continuously enure to defendant's benefit (and to plaintiff's detriment) by aiding defendant in safeguarding his property from theft, etc.

We are unable to discern any public interest to be served by defendant's actions such as to bring him within the protection of the rights of free speech and press. Any such right that he might have had were lost to him when his motives evolved into continued punishment and harassment of the plaintiff; and his selfish motive of protection of his property became the main motivation for his continued publication of plaintiff's picture and the information pertinent thereto.

It appears obvious, from the record, that one of defendant's motives in displaying plaintiff's picture in defendandant's washateria was to coerce payment of that which defendant claims that plaintiff took from him. Accordingly, the Louisiana jurisprudence dealing with the extent to which a creditor may apply pressure on a debtor should be examined.

A creditor may employ any reasonable, non-coercive methods in an attempt to collect that which is owed to him. However, when he oversteps the bounds of propriety and takes unreasonable, coercive action, he has committed tortious conduct for which the law provides a remedy. In the following cases it was found that the conduct of the defendant-creditor was actionable: Tuyes v. Chambers, 144 La. 723, 81 So. 265(1919) (the defendant printed and published plaintiff's name on a list of delinquent debtors); Booty v. American Finance Corp. of Shreveport, 224 So2d 512 (La. App. 2 Cir. 1969) (the defendant sent a series of letters - no less than ten - to plaintiff's employer informing it of the status of its employee's debt; creditor telephoned the office of employer and requested assistance in the collection of the debt; agents of the defendant told plaintiff that they would have him fired from every job until he left town); Boudreaux v. Allstate Finance Corp., 217 So2d 439 (La. App. 1 Cir. 1968) (the creditor telephoned plaintiff's neighbors and characterized plaintiffs as deadbeats, apprised the neighbors of plaintiff's delinquency in payment of the debt due defendant); Pack v. Wise, 155 So2d 909 (La. App. 3 Cir. 1963), writ refused 245 La. 84, 157 So2d 231 (the defendant-creditor contacted plaintiff's employer of an alleged delinquent indebtedness; he telephoned the employer and explained the situation; he furnished the employer with a letter received by him from plaintiff's attorney informing him of potential litigation were he to continue his collection efforts; plaintiff was fired as a result of the foregoing). See also Malone, 25 La. Law Rev., 341 (1965).

Plaintiff has answered this appeal seeking an increase in the damages awarded by the trial court. While the award may be somewhat low, we do not find it to be outside of the perimeters of Coco v. Winston Industries, Inc., 341 So2d 332 (La. 1976). Accordingly, we will not disturb the award.

For the foregoing reasons, the judgment of the trial court

is affirmed. All costs of this appeal are assessed against defendant-appellant, King.

AFFIRMED.

January 16, '78

s/ Marie D. Hawkins
Clerk of Court

APPENDIX D

Louisiana Court of Appeal, Third Circuit,
Dissenting Opinion

NUMBER 6007

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

(January 17, 1978)

MICHAEL G. NORRIS
Plaintiff-Appellee

Versus

BRIAN KING
Defendant-Appellant

Appeal from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana; Honorable Martin L. Laird, III, District Judge, Presiding.

Before HOOD, FORET and HEARD, Judges.

HOOD, Judge. (Dissenting)

I disagree with some of the conclusions which were reached by my colleagues in this case. I would affirm that part of the trial court judgment which enjoins defendant from further publicizing the conviction of plaintiff. I would re-

verse that part of the judgment appealed from, however, which condemns defendant to pay damages to plaintiff.

Some of the facts are presented in the majority opinion, but I think the most significant facts essential to a proper disposition of this case were omitted. For that reason I am stating here some of the important facts which obviously were overlooked by my colleagues. Practically all of these facts are uncontradicted.

Defendant King has been managing a washateria in Alexandria since about 1970. From 1970 until 1974, a period of less than four years, many thefts and serious crimes were committed in and around his place of business. At least 36 known thefts were committed in his washateria during that time. Most of those thefts were of clothes and money from Coke machines, but they also included thefts of pieces of furniture, a baby crib, rolling baskets, plumbing fixtures and cases of Cokes. At least ten complete cases of Cokes were stolen from the washateria. On one occasion a purse was taken from a woman while she was in defendant's place of business. At another time, defendant caught two persons in the act of stealing clothes and bottles, and he held them physically until the police arrived. Besides the thefts which were actually committed, the evidence shows that a number of attempted thefts also occurred in the washateria during that time. The locks on defendant's washing machines were damaged many times in the course of those attempted thefts.

In addition to the thefts which occurred in the washateria, several other serious crimes were committed in that immediate neighborhood. These included a nighttime robbery of the nearby Bonanza Steak House in 1974, the robbery of a

service station where the attendant was severely beaten, and a daylight armed robbery of a neighboring business after which the offenders ran by plaintiff's washateria in making their escape. In another instance, the owner of a business located adjacent to the washateria was held at gunpoint by thieves who were attempting to break into a jewelry store.

King was justifiably alarmed by the many crimes which were being committed in and around his place of business, so for his own protection he took some security measures. These included his participation in a security patrol service whereby his washateria was checked by patrol officers at regular intervals. On one occasion he employed detectives to maintain a stake-out to catch offenders. He painted the coin boxes on his machines with special paint so that they could be identified easily, and he used fluorescent powder on those boxes to assist in obtaining finger prints. These security measures, however, did not noticeably reduce the number of thefts which were committed or attempted in his place of business.

In October, 1973, as another security measure, King installed a camera in the washateria which he felt would help in apprehending those who committed thefts there. The camera could be seen by anyone in the washateria, and the fact that it was there apparently brought about some reduction in the number of thefts committed after it was installed. Despite the presence of the camera, however, other thefts and many attempted thefts were committed while it was there, and the locks on defendant's washing machines were damaged during those attempts.

On three different occasions, within one year after the

camera was installed, adequate pictures were obtained of persons committing thefts in the washateria. On the first two occasions pictures were obtained of a person named Rex Countee committing thefts. By means of those pictures Countee was identified, and after being apprehended he confessed that he had committed those thefts, and that he had committed several other thefts in the washateria which had not been photographed by the camera. Charges were filed against him for committing a total of seven thefts of that place of business. He pleaded guilty to all of those charges and was sentenced by the court. Thereafter he made restitution to King of all the moneys he had stolen from him.

The third occasion on which the camera functioned properly was in October, 1974, or about one year after it was installed, when a theft was committed in the washateria by plaintiff Norris and by an accomplice named Marvin Sharp. The camera managed to get pictures of Norris and Sharp while they were in the act of committing the theft, and both of those offenders were identified through those photographs. Charges were filed against them, and Norris was arraigned in November, 1974. He pleaded guilty to the charge which was filed against him, and he was sentenced by the court. The record does not show whether his accomplice, Sharp, has been arraigned or has been sentenced.

The court records relating to the charges against Norris and Sharp, including the plea of guilty which was entered by Norris and the sentence which was imposed on him, are public records which are available to anyone.

After the apprehension of Countee, Norris and Sharp, and the sentencing of the first two named offenders, there was a

decrease in the number of thefts committed in defendant's place of business. The evidence shows, however, that a number of attempted thefts were committed in the washateria after that time, but the pictures taken by the camera were not clear enough for the offenders to be identified.

In April, 1975, or about five months after Norris was sentenced, some more thefts were attempted in the washateria, during the course of which three machines owned by defendant were damaged. The offenders were not detected. Immediately following those incidents King decided that, as another measure designed to reduce thefts in his establishment, he would display in his place of business pictures of the three people who had been photographed in the act of committing thefts. He hoped that that would serve as a deterrent to other would-be thiefs. King stated "I just had to do something because of the increase in what was going on."

In April or May, 1975, therefore, shortly after three of his machines were damaged, defendant erected in his washateria two separate bulletin boards, about equal in size, which faced in opposite directions. On *one* of those boards, he displayed *three* pictures of *Countee*, with labels giving Countee's name and address, explaining how he committed two thefts in the washateria on separate days, and stating that Countee had pleaded guilty to the charges and had been sentenced. One of those labels contained the statement that "Rex paid an additional $40.00 for stolen property." Defendant explained that that payment constituted restitution to King of the amount which Countee had stolen. The labels on the bulletin board showed, therefore, that *Countee had made full restitution before his pictures were publicized.*

On the *other* bulletin board, King displayed *two* pictures of *Norris* and *one* of his accomplice, *Marvin Sharp*. That display also included labels giving *Norris'* name and address, explaining how he committed the theft and stating that Norris had been sentenced and that he now has a police record. On the same bulletin board, opposite Sharp's picture, there was a label giving *Sharp's* name and address, containing statements showing that Sharp was an accomplice in committing the theft, and showing that criminal charges had been filed against him.

The majority opinion correctly describes the pictures and labels which were posted on *one* of the above bulletin boards, that is the bulletin board which contained the display *relating to plaintiff Norris*. Not a word is mentioned in the majority opinion, however, about the other bulletin board, that is the one that was devoted entirely to describing the thefts committed by *Rex Countee*. The majority obviously did not consider the fact that defendant displayed pictures and information about Countee and Sharp, as well as those relating to Norris, on the bulletin boards. I think that is a significant fact which should have been considered.

My colleagues have held that *one* of King's motives in erecting the bulletin boards was "to coerce payment of that which defendant claims that plaintiff (Norris) took from him." I do not think that is a valid issue, since the majority apparently concedes, and the evidence shows, that King had another motive which clearly justified the display. I also feel strongly that the evidence shows that King did not have any such motive. Assuming that it is a valid issue, however, I believe that the majority has erred in considering only a part of the evidence.

I suggest at least six serious errors which my colleagues have made in deciding this case.

One such error is the majority's failure to consider the fact that Countee had already made restitution of the amount which he had stolen, and that defendant had no claim at all against him when the bulletin boards were erected. King thus could have had no motive in displaying Countee's picture, other than to help in reducing the number of thefts in his washateria. Yet, the display on the bulletin board relating to *Countee* was more prominent than was the one which related to plaintiff Norris. The majority does not attempt to explain, and I submit that it cannot do so with any degree of logic, why King displayed *Countee's* pictures so prominently on a bulletin board, if his motive was to coerce *Norris* into making restitution of the money which the latter had stolen. The only plausible explanation which can be given for his act in displaying all of the pictures, including those of Norris, is that it was done to deter other would-be-thieves.

A second error is the majority's failure to note that a picture of *Sharp* also was included on the same bulletin board as that which contained pictures of Norris. King never made a demand on Sharp, and no one has suggested that he was trying to coerce *Sharp* into making a payment to him. One of Norris' complaints, in fact, is that King did not look to Sharp for recovery of a part of his loss. The majority did not, and it cannot, logically explain why King included *Sharp's* picture on the same bulletin board as that containing Norris' picture, if his motive in fact was to coerce *Norris* into paying money to him.

A third error was made by my colleagues in overlooking

the fact that the money which was stolen by Norris was very small, and under no circumstances could defendant's claim for that small amount justify the erection of two bulletin boards and arranging displays on them. King estimated that Norris had stolen the total sum of $50.00. Norris thinks it was less than that amount, and his parents offered to make restitution of $25.00. The evidence does not show the cost of erecting the two bulletin boards which were used by defendant, but it is obvious that the expense of erecting those boards was substantially more than the full amount of any possible claim which King might have had against Norris. It is unreasonable, I think, to hold that King used such an elaborate and expensive means to coerce the payment by Norris of such an insignificant amount.

The fourth error made by the majority was in failing to consider the fact that King had taken several security measures prior to the erection of the bulletin boards in an effort to deter crime in his washateria. The erection of those bulletin boards was consistent with the earlier steps he had taken. It clearly was another security measure, and it was the only such measure which proved to be successful. *After the bulletin boards were erected in defendant's washateria, not a single theft has been committed or attempted in that establishment.* Defendant King testified that "The time when all crimes ceased was when the display went up," and that there have been "absolutely zero" crimes since that time.

The fifth error made by my colleagues is in failing to consider the fact that no request was ever made by plaintiff Norris, or by either of his parents or by his attorney, for the removal of the display. All of them knew that the display was in the washateria, because plaintiff testified that he went

to that establishment and saw it when it was first erected. There is some evidence to the effect that plaintiff's employer asked King to take down the display on one occasion, but that was only a casual request and it was not made in behalf of plaintiff or any members of his family. The first demand for removal of the display which was made in behalf of plaintiff was communicated to defendant King by the filing of the instant suit. It is manifestly unjust, I think, to allow plaintiff to recover damages from King because of the display, after plaintiff had remained silent and had acquiesced in the existence of the bulletin boards, without protest, until the suit was filed.

The sixth error made by my colleagues is in holding that defendant's actions constituted "harassment" of plaintiff and his family. The evidence shows that King never contacted plaintiff Norris or Norris' father at any time. He asked the judge at the time Norris was sentenced if the court would order restitution, as had been done in the Countee case, but the judge declined that request with the explanation that there was a dispute as to the amount which was stolen, and that the question of restitution was a civil matter. Shortly after plaintiff was sentenced King talked to Norris' attorney in the court room, and the latter agreed to confer with his client. Later that afternoon King talked to plaintiff's mother by telephone and asked for restitution, but Mrs. Norris suggested that he talk to the attorney they had engaged to represent her son. King thereupon talked to the attorney again and eventually Mr. or Mrs. Norris, through their attorney, offered to pay $25.00 as a settlement. That attorney testified that he "probably had three or four conversations with him (King) the week following the conviction," and that he then had no further contact with defendant until five or six

months later, in May, 1975. King testified that after talking to plaintiff's attorney, he felt that further efforts to collect were useless, and that he thereupon abandoned the claim. His testimony, in part, is:

> "A. Well, it's too small of amount to really go through any kind of trouble as far as civil proceedings. And if it wouldn't work by simple understanding between two people, two adults, or three adults, as the case was, -- uh -- I figured it wasn't worth messing with, that it was a waste of time."

The record shows that King again talked to Mrs. Norris, plaintiff's mother, and to plaintiff's attorney several months later, in May, 1975, about restitution. Mrs. Norris' testimony conflicts with that of King as to how many calls were made and as to what was said. Mrs. Norris stated that King called her three or four times in November or December, 1974, and that he did not contact her again until five or six months later, in May, 1975, when he talked to her by telephone from five to eight times. She stated that in each of those two series of calls King threatened to publish plaintiff's picture and to embarrass the family if they didn't pay him the small sum he demanded. King concedes that he talked to Mrs. Norris in November, 1974, and in May, 1975, but he says that he did not talk to her nearly as many times as she contends, and he vehemently denies that he ever made any threats of any kind to her or to anyone else.

My colleagues have found that there was "repeated harassment by defendant King of plaintiff and his family," and that defendant King made "threats to plaintiff, the mother, and the integrity of the entire family." I strongly disagree

with those findings, and base that disagreement not only on the evidence, as summarized above, but also on three other important circumstances.

One such circumstance is that, according to the testimony of the attorney who was engaged to represent plaintiff in the criminal proceeding, Mrs. Norris talked to him several times relative to their negotiations with King. She apparently did not mention to that attorney one single time, however, that King had threatened to publish her son's picture or to embarrass the family in any way. The nearest thing to a threat which is suggested in the attorney's testimony was that Mrs. Norris left a note with his secretary on one occasion in May, 1975, indicating that King had threatened to "sue" plaintiff's father. I find nothing menacing about a threat of that kind, if it in fact was made, particularly since plaintiff's own attorney had just suggested to King that he would have to "sue" to obtain restitution and the judge in the criminal case had told him substantially the same thing. It is inconceivable to me that Mrs. Norris would not have told her own attorney about the threats of publication if any such threats, in fact, had been made. The testimony of the attorney supports and corraborates the statements of defendant King that no threats of publication and no threats of any other kind were made.

The second circumstance which convinces me that no harassment or threats occurred is the fact that the trial judge did *not* find that there had been any threats or harassment by King. The trial judge, instead, agreed that King had the right to *erect the bulletin board display* and to maintain it for a period of time. The judge eventually decided to award damages to plaintiff, but he based that decision solely on a

California case, Briscoe v. Reader's Digest Association, 483 P2d 34 (1971), and on a finding that defendant had allowed the display to remain up after Norris had become a "rehabilitated member of society."

The trial judge said:

> "There seems little doubt that at the time of the offense and for a period of time thereafter the defendant was entitled to truthfully discuss this criminal act and even to publish it on the bulletin board in his business. However, this Court feels that as of the filing of this suit the plaintiff had rehabilitated himself and that the continued publication of his offense served no public interest. It is extremely difficult if not impossible to point out an exact time after which the defendant's conduct was legally impermissible. It is also difficult to allocate the embarrassment and humiliation which the plaintiff suffered between the period when the publication was permissible and the period thereafter."

The third circumstance which convinces me that there was no harassment is that, according to the record, King did not contact plaintiff or his attorney, or any member of plaintiff's family, after May,1975, which was about the time the display was erected. The bulletin boards remained in the washateria from that date until about August, 1976. During that entire period of time, about *15* months, King did not make a single demand for payment, he did not offer to remove the boards if payment was made and he had no further contact of any kind with plaintiff, his attorney or his family, until this suit

was filed. I think King would have pressed plaintiff for payment while the display was up, if it actually was his purpose to harass him. Also, when plaintiff's employer casually asked King to take down the display, it seems that King would have said something then about payment if the purpose of the display was to coerce restitution.

I think my colleagues erred in concluding, contrary to the findings of the trial court, that King made threats against plaintiff. The evidence establishes, I think, that defendant erected the bulletin board displays solely to deter further thefts in his washateria, and not to coerce anyone into paying a debt. The evidence shows that it effectively accomplished that purpose Even if we accept my colleagues' holding that *one* of defendant's motives was to coerce payment, they cannot deny that his principal motive was to reduce the number of thefts which were being committed, for his own protection and that of his customers. I think that that is a reasonable and justifiable reason for the display.

My colleagues have noted that "several United States Supreme Court decisions" were cited to support defendant's position. They brush off those authorities, however, without even citing them, by stating that the cases are not applicable here because they "involve publication by either the news media, or by some other organization acting in the public interest." They then hold, as I understand the opinion, that the *news media* has a much greater right of freedom of speech under the First Amendment than does *"the ordinary individual."* The majority then proceeds to apply the case of Briscoe v. Reader's Digest Association, supra, a California Supreme Court case, which also involves a publication by the *news media.* They don't discuss *Briscoe*, except to quote ex-

tensively what the trial judge had to say about it.

I distinguish *Briscoe*, supra, because of the great difference in facts and because I do not feel that it supports the majority's holding, even if we should be inclined to follow the California rule. The facts were that plaintiff Briscoe participated in hijacking a truck in 1956. Thereafter he became entirely rehabilitated, and none of his friends knew about the incident. Eleven years later, in 1967, the defendant magazine published an article on the general subject of the hijacking of trucks, and it specifically referred to the hijacking which had been committed by Briscoe, naming him in the article and stating that he fought a gun battle with the local police. The article did not mention that that hijacking had occurred in 1956, eleven years earlier. Some other dates, ranging from 1965 to the date of publication, 1967, were mentioned in the article, however, and it left the reader with the impression that the hijacking committed by Briscoe was very recent. Briscoe's friends and his 11-year-old daughter learned of the hijacking for the first time from that article. No worthwhile purpose was served by publishing Briscoe's name and the facts relating to the incident.

The facts in *Briscoe* thus are vastly different from the facts presented here, but even under those facts the California Court did not award damages to the plaintiff. The trial court had sustained a demurrer and dismissed Briscoe's suit, and thereafter the Supreme Court reversed and remanded the case for trial. In doing so, the Supreme Court made it plain that it did not hold that plaintiff must prevail in the action. It found simply that Briscoe had been "completely rehabilitated," and that under the assumed set of facts, "there was no independent reason whatsoever for focusing public attention on Mr. Briscoe as an individual at this time." It remanded the case for the trier of fact to determine several things, one of which was "whether any independent justification for printing plaintiff's identity existed." Presumably, the plaintiff would not be permitted to recover if the printing of his name served a useful purpose.

In the instant suit the publicizing of Norris' name occurred shortly after the theft was committed. It was publicized only in defendant's place of business where that offense and many others had occurred. It demonstrated to would-be-thieves and to customers, the probable victims, that offenders would be caught and punished. And, it effectively reduced thefts. There was an independent justification for the display, therefore, and I believe that recovery of damages for the invasion of plaintiff's privacy should be denied even under the California rule.

Also, in *Briscoe*, the evidence showed that plaintiff had become rehabilitated. My colleagues do not, and I submit they cannot, make such a finding relative to Norris in this case. The record shows that when the bulletin board display was erected by King, Norris was under a suspended sentence and was on probation. It cannot be said that he had become rehabilitated by that time. Norris remained on probation for at least six or seven months after the display was first erected, and he then moved to Oklahoma to obtain a better job. There is nothing in the evidence to show whether he became any more "rehabilitated" in Oklahoma than he was here.

Although my colleagues rely solely on *Briscoe*, supra, they have overlooked the fact that that case did not involve any questions of harassment or coercion at all. The decision

was based solely on a finding that the plaintiff had rehabilitated himself after eleven years. Having cited that case as its authority, however, the majority then departed completely from the holding in *Briscoe* and from the holding of the trial court in the instant suit, and instead found that King's purpose in erecting the display was to harass plaintiff and to coerce restitution. I believe that if the display was for the purposes of harassment or coercion, then defendant would have had no right to erect it at all, not even for one minute. The trial court, consistent with the California Court in *Briscoe*, conceded that defendant had the right to erect the display and to maintain it for a period of time. The majority in the instant suit, however, bases its holding on a factual finding and on a principle of law which is entirely different from that found or applied by either the trial court in this instance or by the California Court in *Briscoe*. I think my colleagues have made a mistake in doing so.

The majority apparently did not consider the fact that the information publicized about plaintiff Norris was a matter of public record. I believe that they would have arrived at a different conclusion if they had considered that fact and the case of Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), which was cited by defendant.

The *Cox Broadcasting Corporation* case originated in Georgia. The Supreme Court of that state, citing and relying on the California case of *Briscoe*, supra, held that the First Amendment rights of freedom of speech or of the press did *not* protect the defendant from a claim for damages for invasion of privacy, where the defendant disclosed in a news broadcast the name of a rape victim while it was reporting

the rape case. (See 231 Ga. 60, 200 SE2d 127). An appeal was granted to the United States Supreme Court, and that tribunal *reversed* the Georgia Court on the ground that the victim's name was a matter of *public record*. The decision of the United States Supreme Court in that case clearly supercedes the ruling of the California Court in *Briscoe*. In *Cox Broadcasting*, the United States Supreme Court said:

> "Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the *public record*." [Emphasis added]
>
> * * * * *
>
> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."

I agree with the majority that for many years courts in Louisiana have recognized a cause of action for "invasion of privacy." My colleagues concede, however, that the issues presented in the instant suit are res nova in this state. My own view is that in this case the majority has gone much too far in allowing the judicially-created right of privacy to prevail over the constitutionally guaranteed right of freedom of speech.

I realize that defendant should not be permitted to leave the display up indefinitely, because eventually it would cease to serve the purpose intended and the continued maintenance of it would constitute an abuse of the latter's right of freedom of speech. For that reason I would concur in that part of the trial court judgment which enjoins him from continuing to publicize plaintiff's conviction. I believe, however, that the display was justified and that it was maintained for only a reasonable length of time. For that reason, I cannot agree with that part of the trial court judgment which condemns defendant, who was the victim of the crime, to pay damages to the person who committed that crime, solely because defendant informed his other customers of the fact that the theft had been committed.

For these reasons, I respectfully dissent.

APPENDIX E

Louisiana Court of Appeal, Third Circuit,
Rehearing Denial

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
OFFICE OF THE CLERK

Lake Charles, La., March 1, 1978

Dear Sir:

Rehearing was this day refused in the case entitled Michael G. Norris v. Brian King No. 6007.

Cordially yours,

KENNETH J. De BLANC,
Clerk

Hood, J. votes for a rehearing.

APPENDIX F

Louisiana Supreme Court, Denial of Application
for Certiorari, or Writ of Review

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

MICHAEL G. NORRIS — May 5, 1978

V.

BRIAN KING — NO. 61,924

In re: Brian King, applying for certiorari, or writ of review, to the Court of Appeal, Third Circuit, Parish of Rapides.

Writ denied.

JLD
FWS
AT JR
JAD
PFC

SANDERS, C.J., and MARCUS, J., would grant.

A TRUE COPY
Clerk's Office
Supreme Court of La.
New Orleans
May 5, 1978

s/ *Harold A. Moise, Jr.*
Clerk

Supreme Court, U. S.
FILED
OCT 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-173

BRIAN KING, Petitioner

versus

MICHAEL NORRIS, Respondent

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI FROM THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

KRAMER & DAVIS
James D. Davis
Post Office Box 447
807 Johnston Street
Alexandria, Louisiana 71301
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term,1978

NUMBER

BRIAN KING, Petitioner

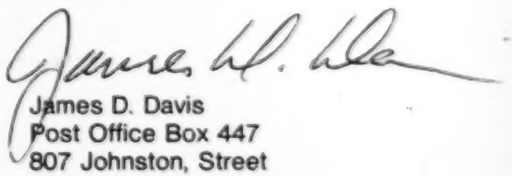
versus

MICHAEL NORRIS, Respondent

MOTION FOR LEAVE TO FILE BRIEF
IN RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

Now comes the respondent and respectfully moves this Court for leave to file the annexed reply to the petition for writ of certiorari under Section 1257 (3) of Title 28, United States Code and Article 3, Section 2 of the Constitution of the United States directed to the Louisiana Court of Appeal, entered on January 16, 1978, writs refused by the Supreme Court of Louisiana May 5, 1978, pursuant to Supreme Court of the United States, Rule 40, and more particularly described in the reply and for such other further relief as may be just and proper.

KRAMER & DAVIS

BY: 

James D. Davis
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Number

BRIAN KING, Petitioner

versus

MICHAEL NORRIS, Respondent

RESPONSE TO PETITION FOR A WRIT
OF CERTIORARI FROM THE LOUISIANA
COURT OF APPEALS, THIRD CIRCUIT

Statement of the Case

Petitioner, Brian King, is the owner of a washateria located in Alexandria, Louisiana. For the protection of that business, Mr. King installed hidden cameras on the premises. In October, 1974, those cameras photographed the respondent, Michael Norris, on the premises. On November 4, 1974, respondent pleaded guilty to a charge of theft of less than $100.00, a misdemeanor. A one year suspended sentence and probation for one year was the punishment imposed.

Michael Norris, at that time, was barely 18 years of age.

Some five months after Michael Norris' conviction, Mr. King erected a bulletin board in his washateria, as is depicted by the reproduction accompanying his brief in support of his petition for writs to this Court.

The bulletin board remained posted with no changes until Michael Norris filed suit approximately seven months later.

Judgment was rendered by the Louisiana Ninth Judicial District Court on November 4, 1976 (19 months after the board was originally posted), enjoining Mr. King from displaying the board and awarding Michael Norris $500.00 damage.

From that judgment, an appeal was perfected to the Louisiana Court of Appeal, Third Circuit. Judgment of that Court was rendered on January 16, 1978, affirming the judgment of the District Court. Rehearing in that case was denied March 1, 1978.

On March 30, 1978, an application for writ of certiorari or review was filed with the Supreme Court of Louisiana. On May 5, 1978, the application was denied by the Supreme Court of Louisiana, the highest Court in the State. Subsequent to the denial of writs on May 5, 1978, Mr. King applied for writs to this Honorable Court.

Argument

An impressive array of questions, arguments and authority has been presented by petitioner, Brian King, in support of granting a writ of certiorari and review to this honorable Court.

Several of the questions raised by petitioner, Brian King, were not considered by the trial Court (Ninth Judicial District Court of Louisiana) in rendering its decision in favor of Michael Norris.

In passing, those questions revolve around an individual's right to publish truthful information about a convicted criminal. The trial Court determined that for a period of time following the incident of October, 1974, and the conviction in November, 1975, Brian King had the right to discuss the events and publish same on his bulletin board. It should be noted that Mr. King did not immediately publish this information, but allowed a period of five months to elapse.

Almost two years following his conviction and sentence, and almost one year from the day of completion of his sentence, Michael Norris was able to obtain the relief he sought, removal of the offending bulletin board. However, such relief has been short lived, as the board has again been posted nearly four years following the incident.

The trial Court, as well as the Third Circuit Court of Appeal of the State of Louisiana, determined that the substantive law of Louisiana allows every citizen to a right of privacy, or more appropriately, a right to be left alone. See Lambert v. Dow Chemical Company, 215 So. 2d 673 (1st Cir. 1968), and cases cited therein. This cause of action, or substantive right, evolved in order to protect citizens from the intentional infliction of mental anguish, humiliation and embarrassment. Additionally, this cause of action was available, even if what was said or published was true, if in fact, the motivation for the statements was personal economic gain or harassment of the declarant. See Tuyes v. Chambers, 81 So. 2d 265 (La. Sup. Ct., 1919).

Both lower courts of the State of Louisiana found that the motivation for the appropriation of respondent Norris' name was for the personal economic gain of Brian King in protecting his business and collection of the debt owed by Norris to King. Both courts expressed the theory that public interest in the events which transpired in late 1974 had waned if, in fact, there ever was any interest to begin with. The continued publication of those events with respondent's name, picture and address served no useful purpose, save Brian King's.

In answer to these determinations, Brian King has sought refuge in the 1st Amendment of the Constitution and erects a facade of reasoning to elevate his actions to that noble level of being the last true defender of the "public's right to know". None of the cases cited by Brian King state that any party, press or individual may appropriate for his economic benefit, the name and likeness and continue to publish daily an event from that person's past. His suggested theory of the pervasiveness of the 1st Amendment would support by analogy any personal vendetta wherein the medium of revenge employed was the daily advertisement of any derogatory or scurrilous event in any person's life

Petitioner suggests that to uphold the lower court's decision would make serious inroads into the free dissemination of information in the United States. Such is not the case, the lower court's decisions do not expunge or seclude from the public domain the public records which contain the very same information; they merely enjoin Brian King's appropriation of Michael Norris' name and likeness for his economic benefit.

Both lower courts recognize that the passage of time erodes the public's interest in an isolated misdemeanor theft wherein the actors were not of great reputation or position.

Conclusion

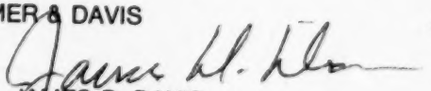
To adopt petitioner's reasoning would mean that Michael Norris, a young man, rehabilitated to the ways of society, but also a convicted criminal for misdemeanor theft, will now again be denied the anonymity that living in a country of 200 million people provides. Now again, nearly four years following a young man's indiscretion, his picture, name and address, form a part of another public record, this Honorable Court's record, with its attendant publicity and public import.

Much discussion of the Briscoe v. Reader's Digest Association 486 P. 2d 34 (1971) case has been included in court opinions and arguments connected to the instant case. Basically, that discussion has centered around the "thief" on the cross being allowed to repent and rehabilitate himself, and that therefore, the states have an interest in allowing modern day criminals to rehabilitate themselves. That is just, but it is also clear that the biblical thief's name, likeness and address were withheld, such relief Michael Norris has been denied.

Respondent respectfully submits and prays that petitioner's application be denied at his cost and that the judgment from which relief is sought become final and executory in all respects.

Respectfully submitted,

KRAMER & DAVIS

BY: 

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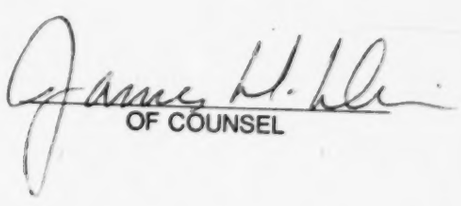
CERTIFICATE

I hereby certify that three (3) copies of the above and foregoing Reply Brief to the Petition for Writ of Certiorari have been mailed to Mr. Frank M. Brame, 426 Kirby Street, Lake Charles, Louisiana, 70601, and Mr. Mack E. Barham, 1800 First National Bank of Commerce Building, New Orleans, Louisiana, 70112, by placing same in the United States Mail, this date, properly addressed, and postage prepaid.

Alexandria, Louisiana, this 11 day of October, 1978.



OF COUNSEL